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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.7

No. 179.

See No 178

THE MINNESOTA AND DAKOTA CATTLE COMPANY, PETITIONER,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 26, 1906.
CERTIORARI AND RETURN FILED FEBRUARY 11, 1907.

(20,499.)

(20,499.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 534.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, PETITIONER,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a In the United States Circuit Court of Appeals for the Eighth Circuit.

Empire State Cattle Company et al. Plaintiffs in Error
No. 8155 vs.
Atchison, Topeka & Santa Fe Railway Company Defendant in Error

Minnesota & Dakota Cattle Company Plaintiff in Error
No. 8157 vs.
Atchison, Topeka & Santa Fe Railway Company Defendant in Error

Stipulation.

It is agreed by the several parties to both of the above causes that said causes were tried together in the trial Court, as appears from the records therein, and that the bills of exceptions in said two causes are precisely the same, and it is further agreed that to save unnecessary costs of printing herein, the entire record in one cause, The Empire State Cattle Company case, including the bill of exceptions therein may be printed, and that in the other cause, the other one of the above causes not so printed in full, the record proper therein may be printed omitting from the printing the bill of exceptions therein, and that this stipulation may be printed in connection with the record proper therein in lieu and in place of the bill of exceptions therein.

And it is further agreed that both of said causes may be heard and argued together in said Circuit Court of Appeals on the record, including the bill of exceptions printed in one of the above causes in full, and that the Court may determine both of said causes on said printed record in full of said cause and on the printed record in the other cause the same as if the said two records had been printed in full.

Dated this 18" day of May, 1905.

BOTSFORD DEATHERAGE & YOUNG
Attorneys for Empire State Cattle Co. et al.
R. E. BALL
Attorney for Minnesota & Dakota Cattle Co.
A. A. HURD, O. J. WOOD, ANGEVINE & CUBBISON.
Attorney- for Atchison, Topeka & Santa Fe Railway Company.

b Nos. 8155 and 8157. Empire State Cattle Co. et al No. 2276 vs. A T & S F R. R. Co. Minnesota & Dakota Cattle Co. No. 2277. vs. A. T. & S. F. R R Co. Stipulation as to contents of record and hearing of cause. Filed Jun 24 1905. John D. Jordan, Clerk.

c In the Circuit Court of Appeals of the United States Eighth Circuit.

Minnesota and Dakota Cattle Company, Plaintiff in Error,
vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant in Error.

It is stipulated that the following parts of the record are not necessary or material for the consideration of the errors assigned, and need not be printed, viz:

1. Original Petition (pp. 5-11).
2. Summons and return (pp. 12 & 13.)
3. Defendant's motion to make more definite (p. 14)
4. Opinion of Court on said Motion (pp. 15-17)
5. Order (p. 18)
6. Original Answer (pp. 19-24)
7. Stipulation as to filing replies (p. 24 1/2).
8. Stipulation (p. 25 & 26).
9. Contracts, Exhibits B to J, Amended Answer. (pp. 42-59)

It is stipulated that Exhibits B. to J. attached to the Amended answer are identical in terms with Exhibit "A", except in the number of cattle mentioned and the number and initials of the cars, and except that Exhibits D. E. G. are endorsed "Kenna, N. M. to Atchison Kas," and Exhibits H. I. and J. are endorsed "Bovina, Tex. to Atchison, Ks". The Clerk will print this stipulation in lieu of printing said Exhibits B to J.

10. Request and notice for amendments to Bill of Exceptions (pp. 81-82)
11. Notice same (pp. 83-84).
12. Motion (pp. 85-87)
13. Motion for order extending time (pp.88).

Clerk will print entire record except above, and except bill of exceptions as heretofore stipulated.

A. A. HURD & ANGEVINE & CUBBISON,
Attys. for Defendant in Error.

R. E. BALL,
Atty. for Plaintiff in Error.

No. 2277 Minnesota & Dakota Cattle Company Plaintiff in Error vs. Atchison Topeka & Santa Fe Railway Co. Defendant in Error. Stipulation as to printing record. Filed Jun 24 1905. John D. Jordan, Clerk.

1 The United States of America. To The Atchison, Topeka and Santa Fe Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit of the City of St. Louis, Missouri, sixty days from and after the date this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein The Minnesota and Dakota Cattle Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witnes, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this 12th day of May in the year of our Lord one thousand nine hundred and five.

JOHN C. POLLOCK,
United States District Judge, for the District of Kansas.

Service of the above acknowledged this 12th day of May, 1905.

A. A. HURD,
O. J. WOOD,
C. ANGEVINE,
Attys for Deft.

2 No. 8157 United States Circuit Court, First Division of the Judicial District of Kansas. The Minnesota and Dakota Cattle Company vs. The Atchison Topeka and Santa Fe Railway Company. Citation. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

3 United States of America—ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the January Term, 1905, thereof, be-

tween The Minnesota and Dakota Cattle Company, plaintiff and The Atchison, Topeka and Santa Fe Railway Company, defendant a manifest error hath happened, to the great damage of the said The Minnesota and Dakota Cattle Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 11th day of July, 1905, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of May in the year of our Lord one thousand nine hundred and five.

The Seal of the Circuit Court of the United States District of Kansas. 1862.

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by
JOHN C. POLLOCK, Judge.

4 Return to Writ.

United States of America,
First Division of the
Judicial District of Kansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court of the United States District of Kansas. 1862.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Topeka this 1st day of June, A. D. 1905.

GEO. F. SHARITT,
Clerk of said Court.

No. 8157. United States Circuit Court, First Division of the Judicial District of Kansas. Minn. & Dak. Cattle Co. vs. A. T. & S. F. Ry. Co. Writ of Error to the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 12th day of May, 1905. Geo. F. Sharitt, Clerk.

* * * * * * * * *

27 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,

No. .... vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

Amended Petition for Damages.

Now comes plaintiff and by leave of court files herein its amended petition, and for its cause of action against the defendant states that at all the times hereinafter mentioned the plaintiff, The Minnesota & Dakota Cattle Company, was and still is a corporation duly organized and existing under and by virtue of the laws of the state of South Dakota and at said times was and still is a citizen and inhabitant of said state of South Dakota; that the said defendant, Atchison, Topeka & Santa Fe Railway Company, during the times hereinafter mentioned was and still is a corporation duly created as a railway company under the laws of the state of Kansas, and at said times was and still is a citizen of said state of Kansas, having its habitation and residence and its chief of office and place of business at Topeka, in Shawnee county, in said First Division of the District of Kansas; that during all of said times the said defendant, in connection with its other lines of railway, owned and operated lines of railway from Kenna, in the Territory of New Mexico, and from Bovina, in the State of Texas, to and through the State of Kansas to the City of Atchison in said State, by way of

Topeka, and that over said lines, in connection with its other lines of railway, said defendant was at said times and still is a common carrier, engaged as a railway company in transporting for hire passengers and all kinds of freight, including live stock, and as such common carrier owes the duty to carry all freight and live stock received by it for trans-
28 portation over said lines, and every part thereof, safely and with due and reasonable care and diligence. Plaintiff states that on or about May 25th, 1903 it was the owner of sixteen hundred thirty-five head of cattle at Kenna, in the Territory of New Mexico, and six hundred fifty-nine head of cattle at Bovina, in the State of Texas, making a total of two thousand two hundred ninety-four head of cattle, which the plaintiff desired to ship from said points to Evarts, South Dakota. That said shipments were made by way of Amarillo, in the state of Texas, and directed by the plaintiff to be made thence over the line of the defendant company from Amarillo, Texas to Atchison, Kansas, and by the Burlington Route from Atchison Kansas to Council Bluffs, Iowa, and by the Chicago, Milwaukee & St. Paul Railway from Council Bluffs to their destination at Evarts, South Dakota. That said cattle were shipped on the 25th and 26th days of May, 1903, in three train loads. Two trains from Kenna, New Mexico, consisting one of twenty cars and one of twenty-two cars, containing in the two trains sixteen hundred thirty-five head of cattle and one train from Bovina, Texas, of seventeen cars, containing the remaining six hundred fifty-nine head of said cattle, all consigned and routed over the defendant's said road as aforesaid.

Plaintiff states that all of said cattle were delivered to the defendant at the points aforesaid, and at Amarillo, Texas, for shipment over the said line of defendant's railway to Atchison, Kansas, and to be delivered there and forwarded by the connecting railway company as aforesaid, and on said dates the defendant accepted from the plaintiff said cattle for shipment as aforesaid, from said points to Amarillo, Texas, and to Atchison, Kansas, over the lines of defendant's said railway.

That defendant transported said cattle over its said line to Kansas City, Missouri, one train thereof arriving at Kansas City on Friday evening, May 29th, 1903, and the other two trains arriving at Kansas City on Saturday morning, May 30th, 1903, about nine o'clock A. M. That in transit two trains of said cattle were unloaded and detained by defendant's orders, at Wellington, Kansas, and the other train at Wellington, Kansas and at Strong City, Kansas, stations

on the line of said defendant's railway, and were not transported to Kansas City, Missouri until and at the times
29 aforesaid. That for several days before the arrival of said trains of cattle in Kansas City, Missouri, continuous and heavy rains had prevailed throughout the western states, and particularly in Colorado, Kansas, Nebraska, Iowa and Missouri, and unprecedented floods had commenced in the waters of the Kaw, or Kansas River, and in the Missouri River, extending from the source of the Kaw River and its tributaries to its mouth, and extending down the Missouri river from its source to the point where the Kaw River empties into the Missouri River. That during all of the time that said cattle were detained at Wellington, Kansas, and at Strong City, Kansas, and during the interval between the dates of their shipment as aforesaid, and of the arrival of said trains at Kansas City, Missouri, the said floods in both said Kaw and Missouri Rivers were daily and hourly getting higher, as the defendant, its officers and agents in charge of and directing the transportation of said cattle well knew. That the defendant failed and neglected to continue the transportation of said cattle to Atchison, Kansas, by way of Topeka, Kansas, as by the plaintiffs directions it was its duty to do, the same being the regular line of transportation and the main line of the defendant's said railway to Atchison, Kansas, but the defendant wrongfully and negligently and of its own motion, and without the consent of plaintiff, deviated from said main line and carried said cattle to Kansas City, Missouri, at which place same arrived as aforesaid, and defendant unloaded the same in the yards and pens of the Stock Yards Company at Kansas City, Missouri, which are located in the bottoms along the Kaw River and near its mouth, where the lands are low, and at a time when the waters of said Kaw River had been continually and still were rapidly rising, as defendant knew, and where the overflow of said Stock Yards by the waters of the Kaw River was hourly threatened, and when the defendant, its officers and agents in charge and control of said cattle, knew that an unprecedented flood was then descending the Kaw River, which would and must overflow the lands where said stock yards were located, and where defendants unloaded and deposited said cattle at the times aforesaid.

Plaintiff states that on Sunday, May 31st, 1903, said
30 pens and yards where said cattle were situated, were flooded and overflowed, and defendant in order to save said cattle from drowning, drove the same together with other cattle then in said yards into the viaducts extending over said pens and yards and above the water, and the same

remained in said viaducts from Sunday, May 31st, 1903, to June 7th, 1903. Plaintiff states that the overflow of said Kaw River at the point where said stock yards are located, extended from May 31st to June 7th, 1903, back from said yards a distance of three quarters of a mile or more, and was of a depth of from eight to fifteen feet, and in consequence of said flood and of the placing of said cattle in the viaducts, it was impossible to feed or water said cattle during said period of seven days and was impossible for the plaintiff to sufficiently feed and water the same.

Plaintiff states that notwithstanding the defendant was negligent as aforesaid in detaining said trains of cattle an unreasonable length of time at Wellington, Kansas, and at Strong City, Kansas, as aforesaid, and in not continuing promptly their transportation to Atchison, Kansas, by way of Topeka, Kansas; and notwithstanding the defendant wrongfully and negligently, without the plaintiff's consent, diverted said shipments and transported said trains of cattle to Kansas City, Missouri, off of the regular and proper route; and notwithstanding the defendant negligently imperilled said cattle by taking them from the high lands and depositing and unloading them near the mouth of the Kaw River, under the circumstances aforesaid, still the plaintiff states the fact to be that the defendant could have by the exercise of care and diligence taken said cattle out of their perilous position and had time before the overflow and flood of Sunday, May 31st, 1903, to have hauled said cattle to a place of safety, or could have had them transported from their place of peril by some connecting railroad, but defendant failed and neglected to do this and allowed said cattle to be and remain in the yards and pens where they were overtaken by the flood as hereinbefore stated.

Plaintiff states that said cattle were so transported and hauled by the defendant of its own motion, and without the consent of plaintiff or consultation with the plaintiff, its servants and officers in charge of said cattle, and
31 contrary to the directions of plaintiff as to the routing of said cattle to Evarts, South Dakota. Plaintiff states that at the time and places of shipment of said cattle as aforesaid, they were in good condition, and were worth the price and sum of twenty-two dollars per head. Plaintiff states that by reason of the premises, and as a direct result of the acts of the defendant hereinbefore states, four hundred sixty-five head of said cattle died and were wholly lost to the plaintiff, and thereby plaintiff lost and was damaged in the sum of ten thousand two hundred thirty ($10,-

230.00) dollars; that the remaining eighteen hundred twenty-nine head of said cattle were so weakened and emaciated by reason of the premises and by reason of being confined for the time aforesaid without food or water, that the same were injured and deteriorated in value, and plaintiff actually lost in value the sum of at least ten dollars per head, making a total damage and loss on account of the injury and deterioration of the remainder of said cattle, suffered by the plaintiff, of eighteen thousand two hundred ninety ($18,290.00) dollars. That on the further transportation of the remainder of said cattle from Kansas City, Missouri to their said destination, the plaintiff incurred and was compelled to pay for extra cars and extra freight, in the sum of eight hundred eighty-eight ($888.00) Dollars. That plaintiff incurred and was put to extra expense in consequence of the premises, and in looking after and attempting to preserve and save as many of said cattle as possible, in the sum of eleven hundred twenty-three and 37/100 ($1123.37) dollars.

Plaintiff further states that the remnant of said shipment of cattle were not delivered to plaintiff at Evarts, South Dakota until about the middle of July, 1903, whereas, said shipments could and should, by the exercise of due care and diligence on the part of defendant, have been so delivered in the early part of June, 1903; and by reason thereof, and by reason of the several negligences of defendant as herein stated, said remnant of said cattle reached said destination in such weak and debilitated condition as to render them unfit and incapable of enduring the rigors of the following winter, and as a direct result thereof more than five hundred head of said remnant of the cattle died and are totally lost to the plaintiff to its further and additional damage in
32 the sum of twelve thousand ($12,000.00) dollars.

That the total damage and loss suffered and sustained by this plaintiff by reason of the premises, and by reason of the wrongful acts and negligences of defendant as aforesaid, is forty-two thousand six hundred twenty-one and 37/100 ($42,621.37) dollars.

Plaintiff states and charges the fact to be that by the exercise of due and reasonable care in the carriage and transportation of said cattle from the point of shipment aforesaid to Atchison, Kansas, all of said loss and damage could have been avoided, and that defendant was guilty of negligence therein in the following particulars to-wit:

First. Defendant did not exercise due and reasonable care, but was negligent in its detention of said cattle at Wellington, Kansas, and at Strong City, Kansas, and by the exercise of due and proper diligence could have carried and transported said cattle to Atchison, Kansas, by way of Topeka, Kansas, and delivered the same to the connecting carrier at that point, and thus escaped the peril and destruction of the flood.

Second. That defendant was guilty of negligence, after having so long detained said cattle at Strong City and at Wellington, Kansas in not further detaining or holding them in some place of safety until the unprecedented flood in the Kaw River, hereinbefore mentioned, had subsided, so that the transportation of said cattle might be safely resumed.

Third. That defendant was guilty of a wrongful and negligent act in diverging and deviating the shipments of said cattle to Kansas City, Missouri, off of the line of transportation over which said cattle were directed by the plaintiff to be carried.

Fourth. That the defendant negligently and carelessly and knowing that an unprecedented flood was descending the Kansas River, hauled said cattle into the low lands at the mouth of said River, and unloaded and left them in front of the approaching flood.

Fifth. That defendant, after having wrongfully transported said cattle to Kansas City, Missouri, as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved, the same from their position of peril in the Stock Yards at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, but the same were overtaken by the flood.

33 Sixth. That the defendant did not exercise due and reasonable care and diligence and was negligent in not properly or sufficiently feeding and watering said cattle, both while the same were at Strong City, Kansas, and at Wellington, Kansas, and while the same were in the yards and viaducts of the Kansas City Stock Yards Company at Kansas City, Missouri.

Plaintiff further states that all of the several injuries, damages and losses to and of said cattle hereinbefore specified, and the losses and expenses aforesaid, were each and all caused by the several negligencies and want of due and reasonable care in the transportation and carriage of said cattle by the defendant.

Wherefore the consideration of the premises, the plaintiff says that it has been damaged by the acts, negligencies and want of due and reasonable care on the part of the defendant, in the sum of forty-two thousand six hundred twenty-one and 37/100 ($42.621.37) dollars, for which sum, together with interest thereon, and the costs of this suit, the plaintiff prays judgment.

R. E. BALL,
Attorney for Plaintiff.

Received copy of the foregoing amended petition, this ..... day of December, 1904.

.....
Attorney for Defendant.

Indorsed: 8157. Minnesota & Dakota Cattle Co., Plff., vs. Atchison, Topeka and Santa Fe Railway, Deft. Amended Petition. Filed Jan. 16, 1905. Geo. F. Sharitt, Clerk. R. E. Ball, Atty. for Plff.

34 In the Circuit Court of the United States for the District of Kansas.

The Minnesota and Dakota Cattle Company, Plaintiff,
No. 8157. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Amended Answer to the Amended Petition.

Now comes the defendant in the above entitled cause and for amended answer to the plaintiff's amended petition filed therein, denies each and every allegation therein contained, except as hereinafter expressly admitted or stated.

2. For a second and further defense the defendant says that it is a corporation duly created and existing under the laws of the State of Kansas, and as such is engaged in the operation of a line of railroad into and through the States of Illinois, Iowa, Missouri, Kansas, Colorado, California, and Texas, and into and through the Territories of Oklahoma, Indian Territory, New Mexico and Arizona; but denies that it is engaged in the operation of a line of railroad to or from the station of Kenna, in the Territory of New Mexico, or the station of Bovina, in the State of Texas; but alleges that it received the cattle mentioned in plaintiff's petition from a connecting carrier to be transported over a portion of its line of railroad and delivered to a connecting carrier to be forwarded to the destination of said cattle, upon the terms and under the provisions of ten (10)

certain written and printed contracts, executed and entered into between the said plaintiff or its duly authorized agents and the railroad companies to which said cattle were delivered for shipment at said station of Kenna, in the Territory of New Mexico and Bovina in the State of Texas; copies of which said written and printed contracts are hereto attached, made a part of this answer, and marked respectively Exhibits A, B, C, D, E, F, G, H, I and J, and upon no other terms and conditions than those fully expressed in said written and printed contracts. That at the time of making the said contracts this defendant operated a line of railroad connecting with the railroad of the Southern Kansas Railway Company of Texas, at Higgins, on the State line of Texas, which latter line of railway connected with the railway of The Pecos & Northern Texas Railway Company, and extending thence to the City of Topeka, in the State of Kansas, and to the City of Kansas City, in the State of Missouri, and also a line of railroad extending from said City of Topeka, to the City of Atchison, in the State of Kansas. That at said city of Atchison, it formed a connection with the railroad of the Kansas City, St. Joseph & Council Bluffs Railroad Company, a line of railroad constituting a part of what is known as the Burlington Route, which latter road extended northward and connected with certain lines of railroad connecting with the Chicago, Milwaukee and St. Paul Railway, which extended to the point of destination. That the defendants line of railway connected also at Kansas City, Missouri, with several lines of railway extending northward, including the Missouri Pacific Railway which connected with other lines of railway and with the Chicago, Milwaukee & St. Paul Railway extending to the point of destination, and that over either of said routes or lines of railway, by way of Atchison, Kansas, or Kansas City, Missouri, through or joint rates existed between the point of origin and point of destination of said shipment of cattle, and either of said routes or lines, to Atchison, Kansas, or to Kansas City, Missouri might well be selected by said defendant to transport said cattle and to make delivery thereof to some connecting line in the route. That it received the said cattle at the said station of Higgins for transportation, under and in pursuance of the foregoing contracts, over its line or lines of railroad to be delivered to a connecting carrier for transportation and to be delivered at the point of destination. That while said animals were being transported over its line of railway and before they arrived at said city of Topeka, this defendant was informed by the Kansas City, St. Joseph & Council Bluffs Railroad Company, that it could not receive said cattle at Atchison, Kansas, and could not transport the same,

on account of a washout on the line of its road, and that
36 it would decline and refuse to receive the same for such transportation. That there existed no adequate or sufficient stock yards at said City of Atchison in which to hold said cattle until delivery could be made there to said connecting line, or to some other connecting line, and in the meantime the said line of the defendant between the Cities of Topeka and Atchison became impassable on account of water rising above the railroad tracks so that such line could not be used by this defendant, and it could not safely make delivery to a connecting line at Atchison. That thereupon it entered into negotiations with The Missouri Pacific Railway Company to receive said cattle at Kansas City, Missouri, and transport the same northward and deliver the same to some connecting carrier for delivery to the Chicago, Milwaukee and St. Paul Railway Company, which last named company could transport said cattle to the place of destination. That said defendant was advised by the said The Missouri Pacific Railway Company that it could and would receive said cattle upon their arrival at Kansas City, and thereupon, with the knowledge consent and acquiescence of the plaintiff, this defendant proceeded to and did transport said cattle to Kansas City, Missouri, for delivery to said The Missouri Pacific Railway Company and upon arrival of said cattle at said Kansas City did deliver twenty car loads of said cattle containing 760 head of said cattle, to the said The Missouri Pacific Railway Company to be by it transported and delivered to the Chicago, Milwaukee & St. Paul Railway Company, and the said The Missouri Pacific Railway Company received said twenty car loads of cattle for that purpose, and this defendant did deliver the remainder of said cattle to the Union Stock Yards, at said City and placed them in that portion of said stock yards where cattle are usually placed when the same are to be reloaded for shipment over the said Missouri Pacific Railway Company's lines, which is the usual and customary manner of handling live stock shipments through Kansas City, to hold the same until the said Missouri Pacific Railway Company would be able to load and transport said cattle. That said cattle arrived at Kansas City Stock Yards on the evening of May 29th and the morning of May 30th, 1903. That before said cattle could be removed from said stock yards at said Kansas City the waters of the Kaw
River and the Missouri River at and adjacent to Kansas
37 City, suddenly arose to an extraordinary and unprecedented height and overflowed their banks and inundated said Kansas City Stock Yards and destroyed the tracks of all railroads entering Kansas City. That said flood was unusual, extraordinary, and unprecedented, and constituted in law

an act of God. That all the injury to said cattle or any of them, and all damages sustained by plaintiff on account of the injury to said cattle was proximately caused by an act of God in the nature of an unusual extraordinary and unprecedented flood on the 30th and 31st days of May, 1903, and was not proximately caused by any negligent act or omission on the part of said defendant railway company or any of its officers, agents employes or servants.

Defendant further says that the said plaintiff wholly failed and neglected to give notice in writing of its claim for damages on account of the loss and injury to said cattle to any officer of said defendant company, or to its nearest station agent, or to the nearest station agent of the last carrier making delivery of said cattle, before said stock were removed from the place of destination above mentioned, or from the place of delivery of the same to consignee, and before said stock were slaughtered or intermingled with other stock, and failed and neglected to make written claim for such damages to the defendant company within ninety-one days after said loss and injury to said cattle occurred, as a condition precedent to said plaintiffs right to recover damages for such loss and injury to said cattle; as provided in the eighth paragraph of the shipping contracts under which said cattle were transported.

3. As a cause of action and counter-claim against the said plaintiff and in favor of the said defendant, The Atchison, Topeka and Santa Fe Railway Company, the said defendant, making all of the allegations of the second count of this answer a part of this count as far as the same are applicable, as fully as though the same had been sent forth at length herein, says that after said cattle arrived at Kansas City and before they could be removed from said stock yards the waters of the Kaw River and the Missouri River at and adjacent to Kansas City suddenly arose to an extraordinary and unprecedented height and overflowed their banks and inundated the said Kansas City stock yards and destroyed the tracks of all railroads
38 entering Kansas City; that such flood was unusual, extraordinary and unprecedented, and constituted in law an act of God. That when the said Kansas City stock yards became inundated the Stock Yards Company, in its efforts to preserve said cattle, and with the knowledge and consent of the persons in charge thereof, drove them into overhead passages or viaducts on the premises of said stock yards company and fed them and cared for them until the flood subsided. That but for the prompt action of the said Stock Yards Company, acting in the emergency provided by the flood, all of said cat-

tle would have been destroyed. That the reasonable value of the hay and other food given to said cattle by the said Stock Yards Company while they were so in such viaducts or overhead passages, and while they were in the Stock Yards, and the reasonable value of the services rendered in caring for them, was and is twenty four hundred and twenty-eight and 60/100 dollars ($2428.60); that the said defendant company, as is the general custom, well known to the said plaintiff, in cases where cattle in the possession of railway companies in the course of transportation are fed, watered and cared for by a stock yards company, paid to the said Stock Yards Company the sum of $2428.60 and took from the said Stock Yards Company an assignment of its said account and lien for feed charges upon said cattle, as aforesaid, and is now the owner of said account.

Defendant further states that after the flood waters of Kansas City subsided the said cattle were in such a weak and impoverished condition that they were unfit for immediate shipment to destination, and it became and was necessary that said cattle should be put upon pasture in order that they might gain sufficient strength to be able to be shipped to destination; that with the consent and at the request of the owner of said cattle they were taken by the defendant to Emporia, Kansas, and there put upon pasture and kept for a space of about twenty-two days, until they had gathered sufficient strength to be transported on to destination. That the reasonable value of the pasturing bill incurred in respect of said cattle in so being pastured is twenty-eight hundred and twenty and 38/100 dollars ($2820.38) which said sum the said plaintiff, the
39 owner of said cattle refused to pay, and the defendant paid the amount thereof and took an assignment of said account and the lien therefor. Defendant further states that no part of said bills for feed or pasturage has been paid by the owner of said cattle, the said plaintiff, to the defendant, and that the same and every part thereof is due and owing to the said defendant.

Defendant further states that while said cattle were on pasture at Emporia, Kansas, and before it had paid the bills hereinbefore referred to, a controversy arose between the said defendant and the said plaintiff, as the owner of said cattle, as to the legal liability of such owner for said pasturage bills and feed charges, and it was thereupon agreed between the said plaintiff and the said defendant that the said cattle when ready for shipment, should be forwarded to destination, without prejudice to the rights of either of the parties; and accordingly a written agreement was entered into between the plaintiff

and the defendant herein, whereby the plaintiff became bound to defendant in the sum of ten thousand dollars, conditioned that the plaintiff should well and truly pay all proper expense, feed, and pasture bills which might ultimately be adjudged to be a proper claim against the owner of said cattle, or to have a lien therefor, whether in favor of the defendant or in favor of any one to whose right the defendant has succeeded; a verified copy of which said bond is hereto attached, made a part hereof, and marked Exhibit "K".

Defendant further states that by reason of the facts above recited the said charges for feed and pasturage bills were proper claims against the owner of said cattle, and that a lien existed therefor according to the laws of the State of Kansas, and that the defendant has succeeded to the rights of the persons in whose favor such liens existed.

The defendant therefore prays judgment against the said plaintiff for the sum of fifty-two hundred and forty-eight and 98/100 dollars ($5248.98) with interest thereon at the rate of six per cent per annum from the date of said payment, and the costs of this action.

A. A. HURD,
ANGEVINE & CUBBISON,
Attorneys for Defendant.

EXHIBIT A.

Form 67 Regular. Read this Contract carefully, as numerous changes have been made. No.....14.....

LIVE STOCK CONTRACT (LIMITED LIABILITY.)

The Pecos Valley & Northeastern Railway Company.

RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK.

NOTICE—This Railway has Two Rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper by accepting this contract is deemed to accept the lower rate upon the terms and conditions specified as part of this contract.

No station agent or station master of this Company has any power or authority to bind this Company in regard to the shipment of Live Stock, except by written contract; nor to agree for the Company that cars shall be furnished at his or any other station for shipment of Live Stock at any special date, or that any particular kind or class of cars will be furnished for such purpose, or that Live Stock will be forwarded on any particular train, or be delivered at destination at any special time or for any particular market, or to transport stock beyond the line of this Company's road. No one but a general officer of the Company, and he only in writing, has power to make such contract.

No. of Cars.	Initials.
2396	4 C
523	"
3435	S W S
1194	4 C
5922	P. V.
54304	A T
60035	S J V
52529	A T

THIS AGREEMENT, Made at Portales, N. M. Station.

May 25, 1903, between and on behalf of the above named Railway Company, hereinafter called the Company, and the connecting carriers severally, of the first part and Minnesota & Dakota Cattle Co. of Kenna, N. M., hereinafter called the shipper, of the second part:

WITNESSETH, THAT, WHEREAS, the Company transports live stock as per rules and regulations, all of which are made a part of this contract;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and conditions hereinafter contained, the Company agrees to transport for the shipper, upon its own road only, the live stock described below, as herein provided, viz.:

10 cars, said to contain 393 head of cattle

, from Kenna, N. M. Station, on the Company's road

consigned to Minnesota & Dakota C. Co. at Evarts, S. D.

to be carried by said Company to said place of destination, if the same be upon the line of road of said Company, but if such place of destination be beyond the line of road of said Company, then to deliver or tender such shipment at the connecting point on the line of its road to the connecting carrier, to be forwarded to the place of destination, and on so delivering to such connecting carrier all liability whatever of the Company for carriage of or on account of said stock shall be thereby ended, it being understood that the Company assumes no obligation whatever on account of the carriage of said stock beyond its road, and that the Company shall not be liable for any damage to, injury of or delay of said stock, or of anything whatever that may happen to the same after such delivery or tender of delivery in case such connecting carrier shall refuse to receive the same. Each carrier in the route shall receive such stock when delivered to it and transport the same over its road to the succeeding carrier in the route, and it is distinctly understood that the responsibility of each carrier shall not begin until it receives said stock from the consignor or from the connecting carrier, and shall cease when it delivers the same to the connecting carrier, or, if the last carrier, at the place of destination.

It is also understood and agreed that the Company shall not be held liable for any damages whatever that may accrue to the

54104	"
54466	"

shipper or to the stock in case the other carrier or carriers shall refuse to carry or deliver the stock on the payment of said rates, but shall only be liable to pay to the shipper, on thirty days' notice in writing from the shipper, the amount which he may have been compelled to pay in excess of the rate given, which shall be in full satisfaction and discharge of the guarantee of the Company of the through rate. It is understood and agreed that such guarantee shall not in any wise be construed to extend the liability of the Company on account of said stock beyond the delivery or tender thereof, as hereinbefore stated.

In consideration of the foregoing, it is further mutually agreed between the parties hereto as follows:

FIRST. That the live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular market.

SECOND. The Company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than 28 consecutive hours without unloading the same for rest, feeding and water, for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

THIRD. The shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, and it is understood that the rate given is based upon such limit of valuation and that in case of loss or damage from any cause for which the Company may be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed the following, which is understood not to exceed to be the value as held by the shipper, and which is the highest value accepted for the lower rate, animals of a higher value being charged a higher rate, to-wit:

Each horse or pony, gelding, mare or stallion, mule or jack, per head,	$100	Each calf.....per head.	$10
Each ox, bull or steer.....	" 50	Each hog.....	" 10
Each cow	" 30	Each sheep or goat.....	" 3

FOURTH. The shipper agrees at his own cost and expense to properly bed the cars in which the stock are to be transported, and in all respects to put them in proper condition for shipment of said stock, and also agrees before the cars in which said stock is to be transported leave said first named station, that he will carefully examine the same, and that if any defect or deficiency whatever be found in any of said cars, that he will at once report the fact to the station agent of the Company and demand, in writing, another car or cars in lieu thereof; and if the shipper shall fail to make such demand, it shall then be conclusively presumed that said cars and each of them are in all respects suitable for transportation of said stock, and the shipper agrees to assume and hold the Company not liable for any damage that may occur to the stock on account of any defect in the cars or any of them, which were not so reported to the Company's said agent.

The shipper further agrees to see that the cars are securely fastened, so as to prevent the escape of stock therefrom, and that he will not hold the Company responsible for any loss or damage that may result from failure or neglect on his part, or of his agents or employés, to do so; and also agrees to assume all risk of injury or loss of or to said stock because of any defect in said cars, or because of the stock being wild, unruly, weak, or maiming each other or themselves, or because of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever, and especially because of the burning of hay, straw or other material used in bedding or feeding the stock, or for any other purpose; and for any injury or damage to said stock while in transit, it shall be presumed that the same resulted from overloading, or from the neglect or inattention of the shipper or his employés, for which the Company shall in no respect be liable.

FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employés as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence.

SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employés to work or otherwise, or by failure of machinery, engines or cars, or injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, or crowding one upon another, or from any and all other causes whatever; the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit.

SEVENTH. The shipper further agrees that at the end of every division or wherever the train conductor shall be changed, on request of the conductor, the party in charge of the stock (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof, and the delays, if any, on such division, and the time and cause thereof, and everything unusual or exceptional that may have occurred to the stock, specifying all his complaints as to the manner in which the train and stock were handled on such division, and to deliver the same to the conductor on that division; and whenever the same shall be unloaded at any station, before they leave such station, the party in charge (and if more than one, all of them) shall make, sign and deliver to the station master a statement of the condition of said stock and of anything unusual or exceptional that may have occurred at such station, specifying all complaints as to the manner in which the stock have been handled or treated at such station, and the shipper shall be conclusively estopped from denying the truth of such statements or any or every of them, and the failure to deliver any and every of such statements herein provided shall conclusively bar and discharge any right of action of the shipper for loss or damages to said stock from whatever cause.

EIGHTH. In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a *condition precedent* to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give *notice in writing* of his claim therefor to some officer of said Company, or to the nearest station agent, or if delivered to consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for can not and shall not be waived by any person except a general officer of the Company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the Company within ninety-one days after the same may have occurred.

NINTH. It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit.

In the event this agreement for institution of suit within six months should be held invalid, then no such suit or action shall be maintainable unless instituted within two years next after the occurrence of the loss or damage, and the expiration of such two years shall be a complete bar to any recovery of damages.

TENTH. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company, is the rate fixed by said Company and the companies or carriers operating the connecting lines of railroad to the point of destination in their tariffs or schedules for similar shipments at owner's risk, under and in view of the limitations and exemptions contained in this agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk:

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and that each of such carriers shall only be obligated to transport said stock over its own road and deliver to the next connecting carrier, and the last carrier to the place of destination, under the provisions of this agreement, and no carrier or carriers shall be liable, in any event, for any loss or damage which may occur upon the road or roads, connecting or otherwise, of any other carrier or carriers; that each of the connecting carriers shall transport said stock over its own road under said through rate, in accordance with the provisions of this agreement, and that this agreement is entered into by the above named Company in its own behalf and as agent, for and, severally and not jointly, on behalf of, each of the connecting carriers operating roads forming part of the route over which said stock may be shipped to the point of destination above mentioned; that no other contract shall be required or be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers as the several contracts between said shipper and each of such carriers respectively, provided for their mutual rights and obligations.

ELEVENTH. The shipper shall hold the carrier harmless from any and all claims for injuries to persons accompanying said cattle for said shipper, resulting from the carrier's or employés negligence or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof, or any expense it may be put to or damages it may be required to pay by reason of the introduction of said cattle into a country, territory or state against the quarantine or other laws of the United States or of any state, territory, people or community. In case the carrier shall be obliged to pay damages on account of the loss of or injury to said cattle, it shall be subrogated to the shipper's right to any insurance thereon.

It is also expressly agreed that the Company shall not be liable for any delay or damage sustained by the stock or any expense incurred by the shipper by reason of any enforcement or attempted enforcement by government officers of quarantine regulations, either state or federal, whether such officers act lawfully or unlawfully, and the shipper further agrees that the Company shall not be liable for any mistake or inaccuracy in any information furnished by the Company or any of its agents or officers as to quarantine regulations, state or federal, it being expressly understood that if any such information is furnished by the Company, it is furnished as pure gratuity, and without any warrant or guarantee of its accuracy.

TWELFTH. *It is distinctly understood and agreed that all prior understandings or Agreements concerning the furnishing of cars or facilities for said shipment or concerning the transportation of said stock or said shipment, are hereby merged and contained in this written agreement, and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock.*

THIRTEENTH. *In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations herein named.*

FOURTEENTH. If the whole or any part of any provision of this instrument shall be adjudged void by a tribunal of competent jurisdiction, the remaining provisions or parts of provisions, in themselves valid, shall not be affected thereby, but shall be as valid and enforceable as if the invalid provision or part of provision had not been inserted herein.

The signature of the shipper or his agent hereto is and shall be conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

Minnesota Dak. Co.
Shipper.

By Will Welch
Agent.

Witness R. L. Simmons
(To be other than either of the contractors.)

THE PECOS VALLEY & NORTHEASTERN RAILWAY COMPANY.
And Connecting Carriers.

By B. F. Pearman
Its Agent.

NOTE.—Agents must see that this contract is signed by the shipper, or in his name by his authorized agent, before commencing to load any of said stock, and that all blanks are properly filled in, and point of destination inserted must not be beyond a line of road in the Sante Fe Route unless special instructions otherwise provide.

NOT NEGOTIABLE.

DROVER'S RETURN PASS.

GOOD FOR CONTINUOUS PASSAGE ONLY.

Return transportation on this contract is available only for the parties that actually accompanied the stock shipment and whose autograph signature or signatures are secured hereon by Agent at shipping point, who will cancel the remaining blank lines.

Furthermore it will not be good for Return Passage until countersigned by Stock Agent or Agent at the station where the stock is unloaded or leaves our line.

Passenger Conductors Will Punch Here.

O O O O O

Agent at Point of Return Will Stamp or Insert Date Below.

From

Date

NO STOP-OVER ALLOWED.

PASS

.....

.....

.....

Countersignature:

.....

Stock Agent or Agents.

Return transportation will be for continuous passage only. No stop-over allowed, and the journey must be commenced on the day the contract is executed for return passage.

This contract will not be accepted for return passage, and conductor will take it up and collect full fare if any alteration, addition or erasure has been made hereon, or if presented by any other than the original holder or holders, whose signature or signatures are hereon. The holder or holders will write his or their signatures below as required.

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.....

.....

.....

H., J. A. & Co. 5M. 10—16–02.

No. .....

(Form 67 Regular.)

LIVE STOCK CONTRACT.

.....Kenna, N. M.....

TO

.....Evarts, S. D .....

..... May 25th .....1903....

Shipper ..... Minnesota & Dakota Cattle Co. .....

Consignee ..... Minnesoto & Dakota Cat. Co. .....

Forwarding Agent's Stamp.

Peros Valley & N. E Ry Co.
May 25, 1903
Portales

.....

Freight Conductors Will Punch Here. O

Pass.....W. Welch.....

.....

.....

parties in charge and accompanying stock.

..... B. F. Pearman ..... **Agent.**

The Agent at the station where the stock is loaded must enter on the back of the Contract the name or names only of the owners or employés in charge who are entitled to pass free with the stocks without regard to passes required by number of cars. Agents must know correct names are entered, and run a pen through remaining lines.

Where a shipment is destined to any point on the lines of The Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, The Atchison, Topeka & Santa Fe Railway Company, Coast Lines, Southern California Railway Company, Southern Kansas Railway Company of Texas, The Pecos Valley & Northeastern Railway Company, The Pecos & Northern Texas Railway Company, Pecos River Railroad Company, the Agent of this Company may fill out this pass to such point of destination, but in so filling out such pass this Company acts only as the agent of such other company or companies, and it is distinctly understood by the shipper that the same shall not render this Company liable for any damage or injury to person or property occurring on the lines of such other company or companies.

[41] [18]

We, the undersigned, owners or in charge of the live stock mentioned in the within contract in consideration of the free pass granted, issued by the within named Company, over its and connecting lines, hereby agree that the within named Company, and each and every connecting carrier which may honor said pass shall not be liable to either of us for any injury or damage of any kind suffered by us or either of us while in charge of said live stock or while in course of transportation or on our return passage.

And whereas travel by freight trains is necessarily more dangerous than upon passenger trains, we hereby assume all the risks incident thereto and of the manner in which such trains are operated, and we hereby further agree to observe the following regulations, and we hereby release said Company, and each and every connecting carrier which may honor said pass, from all liability for any injury or damage suffered by any of us, if injured while violating any of said regulations, and to identify ourselves and each of us whenever required to do so by any conductor:

FIRST. Remain in a safe place in the caboose attached to the cars while the train is in motion.

SECOND. Get on and off said caboose only while the same is still or stationary.

THIRD. Will not get on or be on any freight car while switching is being or is to be done at stations or other places.

FOURTH. Will not walk or stand on any track or station or other places at night without a lantern, and will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is safe to go upon or cross such track or tracks.

FIFTH. Will be advised that freight trains do not stop at stations or other places where it is usually made safe to alight from trains, but are advised of the fact that freight trains frequently stop upon bridges and at places along the line of the road where it is not safe to alight from the caboose without first ascertaining by examining the surrounding ground that it is safe to alight thereat, and will therefore not attempt to alight from the caboose or car whenever the train may stop for any purpose without first making careful examination from the steps of the caboose (with a lighted lantern if at night time) and ascertain the condition of the ground, and first determine by every available means that it is safe to step down from the caboose or car at such place or places, and in this respect will not rely, except at our own risk, on any assurance or statement of the conductor or other Railway employé.

In consideration of the foregoing and of the free transportation, we and each of us hereby agree to assume all the risks of injury from alighting from the caboose or car on account of the condition of the ground or on any account, and agree that in case of any accident, wreck, mishap or other casualty, howsoever caused, in which we or either of us may or shall receive any personal injury, the one so injured shall notify ***in writing*** the Company or carrier upon whose road the accident or casualty may have happened, through his home agent or through the nearest and most convenient local agent of such Company or carrier, of such injury, and of the time, place and all the circumstances and extent thereof, and of the names and addresses of witnesses, within thirty days after the happening of such injury, and as ***a condition precedent*** to the right to maintain any suit or action or recovery on account of such alleged injury; and it is understood that such notice in writing cannot be waived by such home or local agent of the Company or carrier; and we and each of us further agree that we or either of us shall not have any cause or right of action or maintain any action for any injury except that of which notice as aforesaid shall be given to said Company or carrier, as aforesaid, and that no Company or carrier shall be liable for or on account of any injury or damage occurring on the road of any other Company or carrier.

Will Welch.....

.....

.....

Parties in charge of and accompanying live stock.

.....B. F. Pearman..... .....R. L. Simmons.....

Witness.

NOTE.—The agent must witness the signatures to the above release of all parties going in charge of the stock herein contracted for. If the agent making return passes or any conductor suspects the person presenting this contract is not the party who signed above, he will require him to write his name in his presence and compare the signatures.

..... hereby declare the valuation of live stock covered by within contract does not exceed, for

Each horse, pony, gelding, mare, stallion, mule or jack, per head..... $.....

Each ox, bull or steer, per head..... $.....

Each cow, per head..... $.....

Each calf, per head..... $.....

Each hog, per head..... $.....

Each sheep or goat, per head..... $.....

and the reduced rates as given are based upon such valuation.

* * * * * * * * *

("It is stipulated that Exhibits B. to J. attached to the Amended Answer are identical in terms with Exhibit 'A', except in the number of cattle mentioned and the number and initials of the cars, and except that Exhibits D. E. G. are endorsed 'Kenna, N. M. to Atchison, Kas.' and Exhibits H. I. and J. are endorsed 'Bovina, Tex. to Atchison, Ks' ".)

60 EXHIBIT K.

Know All Men By These Presents, that we, the Minnesota and Dakota Cattle Company, a corporation organized under the laws of the State of South Dakota, and M. Mullen, T. B. Tomb, L. A. Allen and Charles Stuebe, are held and firmly bound to The Atchison, Topeka and Santa Fe Railway Company in the penal sum of ten thousand ($10.000) dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 9th day of July, 1903.

The condition of this obligation is such that,

Whereas, the said Minnesota & Dakota Cattle Company did on the 25th and 26th of May, 1903, ship forty-three carloads of cattle from Kenna, New Mexico, consigned to Evarts, South Dakota, and did on the 26th day of May, 1903, ship seventeen car loads of cattle from Bovina, Texas, consigned to Evarts, South Dakota, all of said shipments to be transported over the line of The Atchison, Topeka & Santa Fe Railway Company, or its connections, as shown by the stock contract, to Atchison, Kansas, and thence forwarded to Evarts, South Dakota, the point of destination; and

Whereas, said cattle were taken to the Kansas City stock yards and held there until the flood subsided and then put on pasture, and are now about to be shipped; and

Whereas, said The Atchison, Topeka and Santa Fe Railway Company proposes to forward said cattle consigned to Evarts, South Dakota, in accordance with the existing stock contract; and

Whereas, bills and charges for yardage and pasturage for a large amount are claimed by said railroad company, or by the Kansas City Stock Yards Company against said owners of said cattle, which bills are denied by the above bounden Minnesota & Dakota Cattle Company and payment thereof refused; and

Whereas, said The Atchison, Topeka & Santa Fe Railway Company have agreed to forward the remainder of the
61 cattle so shipped without requiring the payment of such bills and charges for feed and pasturage, upon the giving of a bond conditioned for the payment of said charges, if it shall be ultimately determined that it is liable therefor, or that a lien existed therefor; and

Whereas, the above bounden has agreed to pay the freight on said shipment promptly at destination;

Now Therefore, if the above bounden Minnesota & Dakota Cattle Company and M. Mullen, T. B. Tomb and L. A. Allen, and Charles Stuebe, or any of them, shall well and truly pay all proper expense, feed and pasture bills, which may be ultimately adjudged to be a proper claim against the owner of said cattle, or to have been a lien therefor, whether in favor of said railway company or in favor of any one to whose right the railway company has succeeded, then this obligation shall be void, otherwise it shall be and remain in full force and effect. If the said charges for feed and pasturage are held to be proper charges, then the proportion to be charged against the cattle mentioned herein may be determined on a pro rata basis.

It is expressly understood, however, that neither the said Minnesota & Dakota Cattle Company or the said The Atchison Topeka & Santa Fe Railway Company, by the giving and taking of this bond waive any of their respective rights under the contracts of shipment of said cattle, but all of such rights on the part of both parties shall be and remain as they may be finally determined and agreed upon, or finally adjudged by the courts.

MINNESOTA & DAKOTA CATTLE CO.
By M. Mullen, President.

M. MULLEN
[Seal] THOMAS B. TOMB
CHARLES STUEBE
L. A. ALLEN

Indorsed: No. 8157. Minnesota & Dakota Cattle Company vs. Atchison, Topeka & Santa Fe Railway Company. Amended Answer to Amended Petition. Filed Jan. 16, 1905. Geo. F. Sharitt, clerk.

62 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, Plaintiff,
No. .... vs.
The Atchison, Topeka & Santa Fe Railway Co., Defendant.

Reply.

Now comes at this day, the plaintiff in the above entitled cause and replying to the answer of defendant filed herein, says:

I.

That it denies each and every allegation and averment in defendant's answer contained, and in each and every paragraph and count thereof.

Wherefore, having fully replied, plaintiff prays judgment as in and by its petition herein.

II.

Plaintiff further replying to said answer, states that on June 10, 1903, and just at the time when the flood mentioned in the plaintiff's petition and in defendant's answer, was subsiding at Kansas City, Missouri and while plaintiff's cattle mentioned in the petition herein were still in the custody and control of the defendant, and after defendant and its general officers in charge of and directing the handling of said cattle, knew that a large number of the same had died and been lost by reason of the matters alleged in plaintiff's petition herein, and after the said defendant and its said officers and agents knew that the residue of plaintiff's said cattle that were still living had been greatly damaged and injured as stated in the petition herein, but before either the plaintiff or the defendant knew the exact number of said cattle that had died, or the full extent of the injury to the remainder thereof, the plaintiff duly notified the defendant in writing, and defendant's general agent and officers at Kansas City, Missouri,
63 were then fully advised in writing, and otherwise, that plaintiff claimed and asserted that all damage and loss which plaintiff had suffered or might suffer by reason of the matters and things stated in the petition, plaintiff claimed were so suffered by reason of the acts, negligences and omissions on the part of the defendant, stated in the petition, and that defendant was liable to the plaintiff, therefor. That at said time it was perfectly understood between the plaintiff and the defendant's live stock agent and general

counsel, in numerous conferences, that plaintiff would look to and would claim against the defendant reimbursement for and payment of all loss and damages that had occurred to said shipments of cattle; that at said time both the plaintiff and defendant agreed that the condition of the remnant of said cattle was such that they could not be at once safely transported to their destination in South Dakota on account of their enfeebled condition, resulting from the matters stated in the plaintiff's petition; that plaintiff and defendant, through its said general officers, agreed at said time it to be necessary for the preservation, as far as possible of the remainder of said cattle, and for the purpose of minimizing the loss thereon, that defendant might and should pasture the same until they regained sufficient strength to justify their further shipment to said point of destination. That defendant on said June 10, 1903, and pursuant to the arrangement and agreement arrived at between plaintiff and defendant, after several conferences, removed said remnant of cattle to its pastures at Emporia, Kansas plaintiff consenting thereto, but on the express understanding and notice in writing, given at that time to defendant's assistant general live stock agent at Kansas City, Missouri, that the same should be moved and pastured at the instance, risk and expense of defendant, and in giving said consent the plaintiff did not in any manner waive it- claim for the damages and loss which it had incurred by reason of the matters stated in the petition. That thereafter repeated demands or requests were made by defendant of plaintiff, through defendant's general officers and agents at Kansas City, Missouri, to consent to take said cattle from the defendant, and relieve the defendant from further shipment thereof, but plaintiffs refused to accept said remnant of cattle otherwise than at the point of destination to which, as stated in the petition, they had been originally shipped.

64 That thereafter defendant, after pasturing said cattle on pastures rented and controlled by it near Emporia, Kansas; continued and resumed the transportation of said cattle to said point of destination. That at or about the time of the resumption by defendant of the shipment of said remnant of cattle to the point of destination, the plaintiff gave the defendant an obligation in writing, whereby the plaintiff and certain sureties bound and obligated themselves to the defendant to pay certain charges which defendant claimed plaintiff should pay, which said charges plaintiff asserts were caused and occasioned by reason of the matters complained of in the petition, and plaintiff gave such obligation upon the condition that it should not be bound to pay the same

unless it was ultimately adjudged in any proper litigation to be liable therefor.

Plaintiff further states that all of the damages sued for and claimed by it in this suit, were directly suffered when said consignments of cattle were in the charge, control and custody of defendant; that not only the local agent at Kansas City, Missouri, but the general live stock agent and assistant general live stock agent, and the general solicitor for the defendant, were fully advised at the times mentioned in the petition, and in the answer, of the situation and peril of said cattle, but they and each of them, recognized fully, in the various conferences occuring between said general officers of the defendant and the plaintiff and its representatives, that plaintiff claimed that defendant was liable and responsible to plaintiff for any loss that it had or might suffer in the premises stated in the petition, while defendant denied such liability solely on the ground that such loss was caused entirely by the flood and was occasioned by what is known in law as "the act of God"; that no question was made or raised in any of said conferences that the defendant or its said representatives were not fully advised that plaintiff claimed and asserted defendant's liability for said loss. That defendant and each of its said general officers were at said times fully advised in the premises and knew and know that at the time defendant took the remnant of said cattle to its said pastures, and at the time of the re-shipment thereof, and that at the time of the giving by the plaintiff of the obligation aforesaid for the payment of said extra charges, it was
65 impossible to state definitely and in detail the extent of the loss on said cattle, or the number of them that had died or by reason of the premises would die, or the amount and extent of the injury to the remnant thereof; that nevertheless and as soon as these items of damage and loss could be ascertained, the plaintiff on the .... day of August, 1903, and within the time limited by paragraph eight of the shipping contracts, attached to the answer, itemized and detailed, as nearly as at that time it could, and as a further and separate notice to the defendant, the damages suffered by the plaintiff by reason of the matters and things alleged in the petition; that it again served in writing the defendant, through its general live stock agent at Kansas City, Missouri, with its claim and the items thereof as set forth in the petition, on said .... day of August, 1903, and within the time limited by said paragraph eight of said shipping contract; that prior thereto said general live stock agent and his assistants had referred the matter of the adjustment of plain-

tiff's claim against defendant, to its general counsel at Kansas City, Missouri; that plaintiff through its counsel, upon serving the itemized claim aforesaid on defendant's agent, at once thereafter, and on September 1, 1903, notified defendant's general counsel for Missouri and Iowa, located at Kansas City, Missouri, of the fact of the service of said notice of plaintiff's claim, and requested before taking action, a definite answer as to whether defendant would make any proposition looking to the adjustment of the claim. That thereafter defendant's said counsel advised plaintiff's counsel, in writing, that it would make no proposition of adjustment of the claim, for the reason that in defendant's view, the loss had occurred by reason of what in law constituted the act of God. That by reason of the premises plaintiff has fully complied with the provisions of paragraph eight of said shipping contract and any construction thereof; that by reason of the premises the defendant having been fully advised as aforesaid, has entirely waived any notice under said contract.

Wherefore plaintiff prays judgment as prayed in its petition.

III.

66 The plaintiff further replying and answering to the third count of defendant's answer and counter-claim filed herein, says:

1. That it alleges herein and adopts every allegation as a part of this count of its reply, contained in paragraph two hereof, so far as the same may be applicable.

2. That it denies generally each and every allegation and averment contained in said third count of defendant's answer and counter-claim.

3. That the costs and expenses incurred and laid out by the defendant, if any there be, which are sought to be recovered herein, were incurred and caused directly by the acts, negligences and omissions by the defendant of its duty as a common carrier, all as fully set forth and detailed in the plaintiff's petition herein, and plaintiff herein adopts as part of this reply to said third count of said answer and counter-claim, each and every allegation of its said petition, and says that therein and thereby the defendant is estopped to claim or to recover of plaintiff any such charges and expenses, if any there be.

Wherefore, having fully replied, the plaintiff prays judgment against the defendant as in its petition.

R. E. Ball,
Attorney for Plaintiff.

Indorsed: No. 8157. The Minnesota & Dakota Cattle Company, Plaintiff vs. The Atchison, Topeka & Santa Fe Railway Company, Defendant. Reply of Plaintiff. Filed May 4, 1904. Geo. F. Sharitt, clerk. Refiled Jan. 16, 1905. Geo. F. Sharitt, Clerk.

67 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas (First Division) begun and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:—

Monday January 16, 1905

Empire State Cattle Company, et al
8155 vs.
Atchison, Topeka and Santa Fe Railway Co.

The Minnesota & Dakota Cattle Company a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

By consent of parties, it is ordered by the court that the above entitled cases be tried together, and the jury is directed to find a separate verdict in each of said cases.

68 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:—

Monday, January 16, 1905

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now comes the plaintiff herein by R. E. Ball its attorney; and the defendant by A. A. Hurd, O. J. Wood, Angevine & Cubbison, its attorneys, and also come a jury to-wit:—F. E. McClain, Geo. H. Goudy, J. H. C. Brewer, W. H. Harchbarger, T. J. Beall, H. H. Kern, Ed Speakman, E. W. Glenn, E. L. Cummings, Geo. Bell, H. D. Alcott and S. N. Perry, twelve good and lawful men of the body of the First Division of the District of Kansas, who being duly impaneled and sworn to well and truly try the matters submitted to them in this action, and a true verdict give according to the law and evidence, and thereupon the trial of this case is proceeded with, and not being concluded at the time of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

69 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:—

Tuesday, January 17, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

70 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas (First Division) began and held at the city of Kansas City, Kansas, in said District

on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Wednesday, January 18, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until to-morrow.

71 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Thursday, January 19, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

72 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Friday, January 20, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

73 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Saturday, January 21, 1905.

The Minnesota & Dakota Cattle Company, a corporation,
Plaintiff
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation,
Defendant.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until Monday morning.

74 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota and Dakota Cattle Company, Plaintiff,
vs.
The Atchison, Topeka & Santa Fe Railway Company,
Defendant.

Demurrer to Evidence.

The defendant demurs to the evidence introduced by the plaintiff for the reason that such evidence is insufficient to warrant a verdict for the plaintiff.

The defendant therefore prays the court to render judgment in favor of the defendant.

A. A. HURD,
ANGEVINE & CUBBISON,
THOMAS REYNOLDS,
Attorneys for Defendant.

Indorsed: No. 8157. The Minnesota & Dakota Cattle Company vs. The Atchison, Topeka & Santa Fe Ry. Co. Demurrer to Evidence. Filed Jany. 21, 1905. Geo. F. Sharitt, Clerk.

75 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January, A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Monday, January 23, 1905.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,
8157. vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

Now come the parties herein same as on Saturday last, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

76 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January, A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Tuesday, January 24, 1905.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,

8157 vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present, the trial of this cause is proceeded with and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until to-morrow.

77 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Wednesday, January 25, 1905.

The Minnesota & Dakota Cattle Company, Plaintiff,

8157. vs.

Atchison, Topeka & Santa Fe Railway Company, Defendant.

Now on this January 25th, 1905, again come the parties to the said suit by their attorneys, also comes the jury, and thereupon defendant by leave of court, dismisses its counter-claim against the plaintiff, without prejudice to a future action, and the evidence of the parties herein having been concluded, defendant prays the court to peremptorily instruct the jury to return a verdict for the defendant, which prayer is granted by the court and said peremptory instruction to return a verdict in favor of the defendant and against the plaintiff is by the court granted and given to which action of the court in granting and giving such peremptory instruction, plaintiff at the time excepted. Thereupon pursuant to said peremptory instruction of the court, the jury made and returned in open court the following verdict:

"In the Circuit Court of the United States for the District of Kansas.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,

Case No. 8157. vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the defendant.

F. E. McLain, Foreman."

78 And thereupon all and singular the premises being seen and heard, it is considered, ordered and adjudged that the plaintiff take nothing by its suit, and that the defendant go hence without day with its costs in this behalf laid out and expended. And thereupon on the application of the plaintiff in this cause, it is by the court ordered that the plaintiff be given sixty days from this date in which to prepare and file a bill of exceptions in this cause.

79 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota and Dakota Cattle Company, Plaintiff

vs.

The Atchison, Topeka & Santa Fe Railway Company, Defendant.

1. The defendant requests the court to instruct the jury to return a verdict for the defendant.

Given and excepted to by Plffs.

J. C. P.
Judge.

Indorsed: No. 8157. Instruction requested by defendant. Filed Jany. 25, 1905. Geo. F. Sharitt, clerk.

80 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, Plaintiffs

v.

The Atchison, Topeka & Santa Fe Railway Company, Defendants.

Plaintiff prays the court to instruct the jury as follows:

The jury is instructed to find a verdict for the plaintiffs and against the defendant.

Refused and excepted to by plaintiffs.

J. C. P.
Judge.

Indorsed. No. 8157. Instruction requested by plaintiff. Filed Jany. 25, 1905. Geo. F. Sharitt, clerk.

* * * * * * * * *

89 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, Plaintiff
vs.
The Atchison, Topeka and Santa Fe Railway Company, Defendant.

Now on this 9th day of March, 1905, before said court in open session appear the said parties by their respective attorneys, and thereupon it is made to appear to the Court that the said defendant was served on February 17, 1905, with a bill of exceptions herein, and the defendant desiring further time, it is now by consent of parties ordered that the time for settling, serving, signing and filing the said bill of exceptions be and the same is hereby extended for an additional period of sixty (60) days from and after the termination of the sixty days heretofore given for filing said bill of exceptions, which leave was given on January 25, 1905.

It is further ordered by the court that the defendant have until and including March 31, 1905, within which to prepare and to serve plaintiff's attorneys with amendments to said bill of exceptions, and that thereafter the matter of settling, certifying and signing said bill of exceptions may be brought before the court on five days' notice from either party.

JOHN C. POLLOCK,
Judge.

Indorsed: No. 8157. Order extending time for Bill of Exceptions. Filed Mch 9, 1905. Geo. F. Sharitt, clerk.

90 In the Circuit Court of the United States for the District of Kansas, First Division

The Minnesota & Dakota Cattle Company, Plaintiff
vs.
The Atchison, Topeka & Santa Fe Railway Company Defendant.

Now on this 1st day of April A. D. 1905, it is ordered by the court by consent of both parties that the defendant have until and including the 10th day of April, 1905, within which

to prepare and serve plantiff's attorneys with amendments to the Bill of Exceptions prepared and served in this case, and that except as herein modified the order made in this case on March 9th, 1905, remain as then ordered.

JOHN C. POLLOCK,
Judge.

Indorsed: No. 8157. Order. Filed April 1, 1905. Geo. F. Sharitt, clerk.

* * * * * * * * *

988 In the United States Circuit Court for the District of Kansas, First Division.

Minnesota & Dakota Cattle Company, Plaintiff
No. 8157 vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant.

Journal Entry.

Come again, this 12" day of May, 1905, said parties plaintiff and defendant by their attorneys, and thereupon plaintiff tenders to the court a bill of exceptions herein, and the defendant having examined the same, said bill of exceptions is approved and duly certified, signed and filed and hereby ordered to be made and the same is hereby made a part of the record in this cause, and thereupon said bill of exceptions is filed with the Clerk.

And thereupon at the same time plaintiff file herein its assignment of errors in this cause. And thereupon plaintiff tenders to the court a writ of error to the United States Circuit Court of Appeals for this Circuit, duly approved and allowed by the Judge of this court, and at the same time plaintiff tenders to the court a citation on said writ of error which citation is signed by the Judge of this court.

And thereupon at the same time said plaintiff tenders to the Court its bond for costs on its writ of error herein in the sum of $500.00 which bond is by the court examined and approved and ordered to be filed.

JOHN C. POLLOCK, Judge.

989 Indorsed: No. 8157. Minn & Dakota Cattle Co. v. A. T. & S. F. R. W. Co. Journal Entry. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

990 In the Circuit Court of the United States for the District of Kansas First Division.

Minnesota & Dakota Cattle Company, Plaintiff,
No. 8157. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

1. The court erred in rejecting the evidence offered by the plaintiff of Gardiner Lathrop, S. W. Moore and W. A. Coombs, by which plaintiff offered to show that the remnant of the cattle in controversy, after the subsidence of the flood, were in charge and control of defendant railway company; that on or about June 10, 1903, and for several days prior thereto, a number of conferences were held between the plaintiffs and their counsel on one part, and Mr. Coombs, the assistant general live stock agent of the defendant, and Mr. Lathrop, of counsel for the defendant, in reference to the disposition by the defendant of the remnant of plaintiffs cattle; that the defendant, through its said agent, Coombs, and its attorneys, recognized and admitted that the remnant of the shipments of cattle in question, was in their charge and control, that they requested the plaintiffs to receive and accept these cattle at Kansas City; that defendant, through its said agents and counsel, as well as the plaintiff, in said conferences recognized and admitted that the remnant of said cattle were so weakened and debilitated that they were not then in a condition to be further shipped to their destination, and that it was necessary, in order to avoid further loss, to pasture the cattle somewhere until they attained enough strength to enable them to endure shipment to their destination.

990a 2. The court erred in refusing to give, at the conclusion of all of the testimony, the instruction and charge tendered and requested on behalf of the plaintiff, that under all of the evidence the jury should find that the defendant was liable, and to find for the plaintiff.

3. The court erred, after the refusal of the said peremptory instruction, in refusing to give and charge the jury at plaintiffs request, instructions numbered as follows, and in refusing to give each of them, to-wit: Instructions numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve and thirteen.

4. The court erred in sustaining the motion and request of defendant Railway Company, to direct and in directing the jury to render a verdict for the defendant and against the plaintiff.

5. The court erred in its opinion, shown in the record, in saying "It therefore follows, on the main case, the request for instructions to the jury to render a verdict for the defendant must be sustained, and the like request of the plaintiff must be denied. This will be done."

Wherefore, the plaintiff prays that writ of error be granted and citation duly issued to the defendant, and that the judgment of the Circuit Court of the United States for the District of Kansas, First Division in this cause, be reversed and that said Circuit Court be directed to grant a new trial of said cause.

R. E. BALL,
Attorney[s] for Plaintiffs.

Indorsed: No. 8157. Minnesota and Dakota Cattle Company, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Assignment of Errors and Petition for a Writ of Error. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

991 In the United States Circuit Court for the District of Kansas, First Division.

Minnesota & Dakota Cattle Company, a corporation, Plaintiff,
No. 8157. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Bond for Costs on Writ of Error.

Know All Men By These Presents, That we, The Minnesota & Dakota Cattle Company, a corporation, as principal, and American Bonding Company of Baltimore as sureties acknowledge ourselves to owe and to be indebted to the Atchison, Topeka & Santa Ge Railway Co. in the sum of $500.00 lawful money of the United States to the payment of which well and truly to be made we jointly and severally bind ourselves, our successors, executors administrators and assigns firmly by these presents, sealed with our seals and dated this 13th day of February, 1905.

The above and foregoing obligation is made subject to the following conditions: Whereas lately at a session of the Circuit Court of the United States for the District of Kansas, First Division in a suit pending in said court between the said principal as plaintiff and said Railway Company as defendant, a final judgment was rendered against said plaintiff and in favor of said defendant and said plaintiff has obtained a writ of error to reverse the judgment in the aforesaid suit in said Circuit Court and a citation directed to said Atchison, Topeka & Santa Fe Railway Company is to be issued citing and admonishing it to appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit.

Now Therefore, the condition of the above obligation
992 is such that if said bounden principal shall pay and answer all costs that may be awarded against it and if it fails to make said appeal good, then the above obligation shall be null and void, otherwise to remain in full force and effect.

MINNESOTA & DAKOTA
CATTLE CO. [Seal]
By M. Mullin, Prest.
M. Mullin [Seal]
Charles Stuebe [Seal]
AMERICAN BONDING COMPANY
OF BALTIMORE
By Wash Adams
Vice-Prest.
Attest: Harry D. Walker, [Seal]
Asst. Secty.

Approved this 12th day of May, 1905.
JOHN C. POLLOCK,
Judge Dist. Court of Kas, presiding in U. S. Circuit Court of Kas. First Div.

Indorsed: No. 8157. Minnesota & Dakota Cattle Co. vs. A. T. & S. F. R. W. Co. Bonds for costs on writ of error. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

993 United States of America,
District of Kansas—ss.

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in Case No. 8157, wherein The Minnesota & Dakota Cattle Company, a corporation is Plaintiff and The Atchison, Topeka and Santa Fe Railway Company, a corporation is Defendant.

I further certify that the Original Citation and the Original Writ of Error are hereto attached and returned herewith.

The Seal of the Circuit Court of the United States District of Kansas 1862.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 1st day of June, A. D. 1905.

GEO. F. SHARITT, Clerk.

Filed Jun 24, 1905. John D. Jordan, Clerk.

38 (Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals. Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record of thirty-seven pages in the case of The Minnesota and Dakota Cattle Company, Plaintiff in Error, vs. The Atchison, Topeka and Santa Fe Railway Company, No. 2277, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-eighth day of November, A. D. 1906.

[Seal.]

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1906, of said Court, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the first Monday in May, to-wit: the seventh day of May, A. D. 1906, before the Honorable Walter H. Sanborn, the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges.

Attest:
[Seal]

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twenty-fourth day of June, A. D. 1905, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Minnesota and Dakota Cattle Company was Plaintiff in Error, and The Atchison, Topeka and Santa Fe Railway Company was Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2277.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

2 (Appearance of Counsel for Plaintiff in Error.)

On the third day of July, A. D. 1905, the appearance of Mr. R. E. Ball, as counsel for the plainti in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka & Santa Fe Railway Co.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

R. E. BALL.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2277. The Minnesota and Dakota Cattle Company, Plaintiff in Error, vs. The Atchison, Topeka & Santa Fe Railway Co. Appearance. Filed Jul. 3, 1905, John D. Jordan, Clerk. R. E. Ball, Counsel for Plaintiff in Error.

(Appearance of Mr. R. F. Walker as Counsel for Defendant in Error.)

And on the third day of July, A. D. 1905, the appearance of Mr. R. F. Walker, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

The Minnesota and Dakota Cattle Company, Plaintiff in in Error,
No. 2277. vs.
The Atchison, Topeka & Santa Fe Railway Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

3 R. F. WALKER.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit, No. 2277. Minnesota and Dakota Cattle Co., Plff. in Error, vs. Atchison, Topeka and Santa Fe Ry. Co. Appearance. Filed Jul. 3, 1905, John D. Jordan, Clerk. R. F. Walker, Counsel for Deft. in Error.

(Appearance of Mr. Gardiner Lathrop and Mr. C. Angevine as Counsel for Defendant in Error.)

And on the nineteenth day of December, A. D. 1905, the appearance of Mr. Gardiner Lathrop and Mr. C. Angevine,

as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

GARDINER LATHROP,
C. ANGEVINE.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2277. The Minnesota & Dakota Cattle Company, Plaintiff in Error, vs. The Atchison, Topeka & Santa Fe Railway Company. Appearance. Filed Dec. 19, 1905, John D. Jordan, Clerk. Gardiner Lathrop, C. Angevine, Counsel for Deft. in Error.

(Argument Commenced.)

And on the eighteenth day of December, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

4 United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1905. Monday, December 18, 1905.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Co.

In Error to the Circuit Court of the United States for the District of Kansas.

and

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Co.
In Error to the Circuit Court of the United States for the District of Kansas.

These causes having been called for hearing in their regular order, argument was commenced by Mr. James S. Botsford in behalf of the plaintiffs in error, but the hour of adjournment having arrived before the conclusion thereof, the fur-

ther hearing of these causes was postponed until tomorrow morning.

(Order of Submission.)

And on the nineteenth day of December, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

December Term, 1905. Tuesday, December 19, 1905.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States
5 for the District of Kansas.

and

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

These causes having been called this day for further hearing, argument was continued by Mr. James S. Botsford for the plaintiffs in error and by Mr. Gardiner Lathrop and Mr. C. Angevine for the defendant in error and concluded by Mr. R. E. Ball for plaintiffs in error.

Thereupon the causes were submitted to the Court upon the transcripts of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the ninth day of July, A. D. 1906, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

6 United States Circuit Court of Appeals Eighth Circuit.

No. 2277.—May Term, A. D. 1906.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
vs.
The Atchison, Topeka and Santa Fe Railway Company Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

Mr. R. E. Ball for the plaintiff in error.

Mr. Gardiner Lathrop and Mr. C. Angevine (Mr. Robert Dunlap, Mr. Wm. R. Smith and Angevine & Cubbison were with them on the brief) for the defendant in error.

Before Sanborn, Hook and Adams, Circuit Judges.

By Hook, Circuit Judge:

This case is like that of the Empire State Cattle Company just decided. The two cases were tried together and the facts with some exceptions not material here, were the same, as were also the proceedings in the trial court. For the reasons stated in the opinion in the proceeding case the judgment in this is affirmed.

Filed July 9, 1906.

7 (Judgment.)

And on the ninth day of July, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

May Term, 1906. Monday, July 9, 1906.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,

No. 2277. vs.

The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kansas and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that The Atchison, Topeka and Santa Fe Railway Company have and recover against The Minnesota and Dakota Cattle Company the sum of twenty dollars for its costs herein and have execution therefor.

July 9, 1906.

8 (Motion of Plaintiff in Error for Order enlarging Time to file Petition for Rehearing.)

And on the third day of August, A. D. 1906, a motion of plaintiff in error for an order enlarging the time to file a petition for a rehearing was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals For the Eighth Circuit.

Minnesota & Dakota Cattle Company, [Plaintiffs] in Error,
No. 2277. vs.
Atchison, Topeka & Santa Fe Railway Company, [Defendants] in Error.

Motion of [Plaintiffs] in Error for Extension of Time to File Petition for Rehearing.

Now comes the [plaintiffs] in error in the above entitled cause and show the Court that the judgment and decision of the Court therein, was rendered on the 9th day of July, 1906; that [plaintiffs[in error are advised that the term of Court at which the judgment in the above cause was rendered, will be finally adjourned August 31st, 1906, and the next term thereafter will convene on the first Monday in September, 1906, at Denver, Colorado; that the decision and judgment of this Court is rendered at a time when the Judges of the Court are on vacation, and the [plaintiffs] in error desire additional time to consider the opinion and decision of the Court.

Therefore the [Plaintiffs] in error move the Court for leave to file a petition for a re-hearing in this cause at any time during the term of this Court beginning on the first Monday in September, at Denver, Colorado.

R. E. BALL,
Attorney for Plaintiff in Error.

Endorsed: No. 2277. Minnesota and Dakota Cattle Co., Plaintiff in Error, vs. The Atchison, Topeka and Santa Fe Railway Company. Motion Plaintiff in Error for order enlarging time to file petition for rehearing. Filed Aug. 3, 1906, John D. Jordan, Clerk.

9 (Order enlarging time to file Petition for Rehearing Until November 1, 1906.)

And on the seventh day of August, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order enlarging the time to file a petition for a rehearing until November 1, 1906, in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1906. Tuesday, August 7, 1906.

Minnesota & Dakota Cattle Company, Plaintiff in Error,
vs.
Atchison, Topeka & Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

On motion of the Plaintiff in Error in the above entitled cause, the Court having duly considered the same, it is ordered that the time for plaintiff in error to file a petition for rehearing, if it be so advised, be extended, so that the same may be filed at any time prior to the 1st day of November, 1906.

August 7th, 1906.

(Petition for Rehearing.)

And on the twentieth day of September, A. D. 1906, a petition of plaintiff in error for a rehearing was filed in said cause, in the words and figures following, to-wit:

—IN THE—

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Plaintiff in Error,*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Defendant in Error.*

No. 2277.

Error to the Circuit Court of the United States for the District of Kansas.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

To the Honorable Judges of the Circuit Court of Appeals, Eighth Circuit:

The above named plaintiff in error respectfully petitions this Honorable Court that the order and judgment heretofore entered affirming the judgment of the Circuit Court of the United States for the District of

Kansas, be set aside and a rehearing of this cause be granted, for the reasons and on the grounds following, to-wit:

I.

The Court in its opinion overlooked the fact that the petition of the plaintiff in the above cause on which this suit has been prosecuted asserted liability of the defendant herein on two separate and independent grounds. First, that the defendant was liable by reason of the deviation of the shipments from the Topeka to Atchison route, to Kansas City. Second, that the defendant was liable on the several grounds of negligence charged in the petition.

The cases cited in the opinion of the Court in this cause were all cases where the plaintiff sought to recover on a single ground of liability and that ground of liability involved a question of fact for trial by a jury. As appears from the opinions in this cause, the opinion of this court is the only one which recognizes the rule decided by the court in this cause as proper in cases where the plaintiff rests his claim of liability on a single proposition and that a proposition of fact. The decision of the Supreme Court of the United States and the decisions of the other courts of appeal cited in the opinion in this cause, all seem to recognize that, even in cases where the plaintiff's case rests on a single proposition of fact; the asking of a peremptory instruction does not waive the right to have the case submitted to a jury, if at the time of the submission of the peremptory instruction the party also submits instructions to be given to the jury, if the peremptory instruction is denied.

But if the rule adjudged by the court in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition

of fact, how much more would that result be true in the case at bar? In this case the plaintiff, from the beginning to the end of its case, rested its claim of liability of the defendant on two propositions, one a proposition of law and the other a proposition of fact.

The question of liability based on the deviation arising as it did upon the undenied fact of deviation without plaintiff's consent, presented a question of law pure and simple. That question was one for decision by the court. That is, while the whole case on both propositions was a case for determination by the jury, the question of liability on the ground of deviation was one for decision by the court on a peremptory instruction to the jury given or denied by the court.

The questions of liability on the ground of negligence, presented by plaintiff in its other instructions, all presented questions for decision by the jury. Therefore the case of plaintiff required of necessity from its very nature a decision of one branch by the court and a decision of the other branch by the jury. Of course, if there had been a favorable decision to plaintiff on the issue of law arising on the question of deviation, it would have been unnecessary to submit the questions of fact to the jury, except the amount of damages, but before judgment in the case under any possible circumstances could be lawfully pronounced against the plaintiff, it was entitled to hearings and decisions by the two tribunals of court and jury on both issues. Plainly and undeniably, if the issue of law was decided against the plaintiff on the question of deviation, it was still entitled to the judgment of the jury on the remaining question of fact arising on the issues of negligence. The only proper way in which the court could decide the issue of law arising on the question of deviation, was by giving or refusing plaintiff's peremptory

instruction to the jury. The court decided that issue by refusing plaintiff's peremptory instruction, and it is said now that the court acted properly in refusing to submit the issues of fact to the jury because plaintiff precluded itself from the right to have the case submitted to the jury on the issues of negligence because of its prayer for a peremptory instruction on the issue of law, on the question of deviation.

We submit that this does not follow. We repeat that before judgment could rightfully be pronounced in the trial court against plaintiff it had a right to the trial of both issues by the appropriate tribunals. To say that in a case where plaintiff claims a right to recover on two separate, distinct grounds, judgment must be given against him on both grounds upon an unfavorable decision against him, on either ground, states a proposition which, as it seems to us, finds no support in the law. In effect, it would be giving judgment against a party without due process and without a hearing.

The court in this case says it is precluded from considering and determining whether plaintiff offered sufficient evidence to take the case to the jury on the issues of negligence because it asked the court to decide the questions of law arising on the issue of deviation, by its peremptory instruction. This in in effect giving judgment against the plaintiff on the issues of negligence, without a hearing or decision by either the court or a jury of those issues. It is true that the trial court, in passing on the peremptory instruction asked by plaintiff, decided that the evidence in the case did not warrant a submission to the jury of the issues of negligence, but while that is true, this court holds, although in full possession of the entire case on this writ of error, that this court cannot consider the questions of

law arising on the refusal of the trial court to submit the cause to the jury on the issues of negligence because plaintiff asked a peremptory instruction devoted to obtaining the judgment of the court on the issue of deviation. This, in effect, is a judgment by this court affirming the action of the trial court in holding that the case could not be submitted to the jury on the issues of negligence without a hearing and decision by this court on that branch of the case. We submit, that this is in effect a judgment and decision without a hearing and is in effect a denial of due process.

The point in this case that plaintiff's case rests on two propositions and that therefore it had the right to ask a peremptory instruction and the other thirteen instructions to the jury at the same time, is distinctly presented at pp. 54-55 of our brief and argument in this case, and since that point is entirely overlooked in the decision of the court, it seems to us that on this ground alone the court should grant a rehearing, set aside its judgment of affirmance and affirm the liability of the carrier on the ground of deviation, or hold that the case should have gone to the jury on the issues of negligence.

II.

Briefly summarized the acts of negligence on the part of the Railroad Company, amply proven by the evidence cited and set forth in the statements of the cases (Original Brief pp. 1-52 and 145-169), are:

(a) Its act of bringing these cattle to Kansas City at all, under the existing conditions.

(b) Its act of holding them at Kansas City, one train from Friday evening, May 29th, and the remainder from Saturday morning, the 30th, until overtaken by the flood Sunday.

(c) Its refusal to allow the Burlington to take out the shipments when advised that it was ready and offered to do so. This is a fact *undisputed* and in our judgment should be held negligence as a matter of law.

(d) Its act in itself throwing down the arrangement once made with the Missouri Pacific to take the cattle, *an undeniable fact,* (Rec. 179-195, Brief 152 *et seq.*), which in our judgment constitutes negligence as a matter of law. It will be noted from the evidence of General Manager J. E. Hurley that not all of the correspondence between defendant and the Missouri Pacific was produced, though called for by the notice.

(e) Its act, through its agent, the Stock Yards Company, in crowding the cattle into the overhead viaducts instead of taking them to the highlands.

This in our judgment nearly approached negligence as a matter of law.

There are other acts of negligence, but for the purpose of this point they need not be specified.

We respectfully ask a rehearing for the reason that the foregoing facts should work a reversal under any decision of the question of practice referred to. Sufficient of them in our judgment should be held negligence as a matter of law to meet the exaction of the rule announced by the court, and none of them we submit ought to be judicially declared to be such acts and omissions as are free from negligence, as a matter of law.

III.

The court in its decision in this case has also overlooked the decision of the other question, being the question of law distinctly presented in this case, that the carrier by the deviation of the shipment assumed all consequences of such deviation and made itself absolutely

liable. This proposition of law which runs through the entire case and which is discussed from pp. 119 to pp. 143 of our brief, and affirmed and supported by an unbroken line of authorities, is entirely overlooked in the opinion of the court in this case. In that part of our brief there is a full citation of the authorities on the proposition that where, as in this case, there is a deviation of the shipment without the consent of the shipper, the carrier assumes all responsibility and consequences. and is absolutely liable. The decision of that question fairly arose under the peremptory instruction asked by the plaintiff, with or without a prayer for the other instructions to the jury. This court nowhere in its opinion makes any response to that proposition of law.

On this ground we submit that the court should grant a rehearing.

Robert E. Ball

James S. Botsford

Attorneys for Plaintiffs in Error.

We hereby certify that in our opinion the foregoing motion and petition for a rehearing is well founded in law and should be sustained.

Robert E. Ball

James S. Botsford

Of Counsel.

Endorsed: Filed Sep. 20, 1906, John D. Jordan, Clerk.

17 (Order Denying Petition for Rehearing.)

And on the sixteenth day of November, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1906. Friday, November 16, 1906.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,

No. 2277. vs.

The Atchison, Topeka and Santa Fe Railway Co.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on this day to be heard upon the petition for a rehearing filed by Counsel for the Plaintiff in Error.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause be, and the same is hereby, denied.

November 16, 1906.

18 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing seventeen pages contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said Circuit Court of Appeals (except the transcript of the record from the Circuit Court of the United States for the District of Kansas), in a certain cause in said Court wherein The Minnesota and Dakota Cattle Company is Plaintiff in Error, and The Atchison, Topeka and Santa Fe Railway Company is Defendant in Error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-eighth day of November, A. D. 1906.

[Seal]

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

In the Supreme Court of the United States.

File No. 20499. Case No. 534.

MINNESOTA & DAKOTA CATTLE COMPANY, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant.

Stipulation.

Whereas, in the above entitled cause the plaintiff filed an application in the Supreme Court of the United States for a writ of certiorari therein; and

Whereas, in connection with the plaintiff's application for said writ a certified copy of the transcript of the record was duly filed in the Supreme Court of the United States and nine uncertified copies of the transcript of the record in said cause were also filed, so that the complete record of said case is already on file in the Supreme Court of the United States; and

Whereas, said Court on the 22d day of January, 1907, issued its writ of certiorari removing the above entitled cause from the Circuit Court of Appeals of the Eighth Circuit;

Now therefore, it is stipulated by and between the parties in this case, that the certified transcript of the record that *are* already on file in the Supreme Court of the United States may be taken and treated as the return to said writ, and that the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit may, in lieu and instead of a transcript of the record as required by said writ, send to the Supreme Court a copy of this stipulation, and that said cause may proceed and be heard with the same force and effect as if the said Clerk of said Court of Appeals had duly certified the record of said cause in obedience to the writ of certiorari issued therein. It being the intention of this stipulation that the records already filed in connection with the application of plaintiff for the writ, shall be taken and treated as a full return to said writ, and that the cause shall be heard and considered as if a return to the writ had been made.

R. E. BALL AND
JAMES S. BOTSFORD,
Attorney- for Plaintiff.
GARDNER LATHROP,
ROBERT DUNLAP,
Attorneys for Defendant.

(Endorsed:) File No. 20499. Case No. 534. Minnesota and Dakota Cattle Company, Plaintiff, *vs.* Atchison, Topeka and Santa Fe Railway Company, Defendant. Stipulation as to Return to Writ of Certiorari. Filed Feb. 7, 1907, John D. Jordan, Clerk.

FILED.
JUL 22 1907
JAMES H. McKENNEY
CLERK

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 178.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 179.

On Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

Statements, Specifications of Errors, Briefs and Arguments for Petitioners.

NOTE:—These two cases are alike, involve the same questions of law and fact, were tried together below, and by agreement are to be heard and submitted together here.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al., in No. 178.

R. E. BALL,
Attorney for the Minnesota and Dakota Cattle Company, in No. 179.

PANTAGRAPH PRINTING CO. 909 WYANDOTTE ST., KANSAS CITY, MO.

—IN THE—

Supreme Court of the United States.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners.*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant.*

No. 178.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant.*

No. 179.

It is agreed by and between the attorneys of the several parties in the above entitled causes, that the same may be briefed for the petitioners in the two cases in one brief, and for the defendant railway company in both cases in one brief, and that said causes may be argued and submitted together the same as they were argued and submitted together in the Circuit Court of Appeals; and that the stipulations, of the parties in the Circuit Court of Appeals in said causes, to be found page 660 to 663 in the Empire State Cattle Company case, shall apply to the argument, submission and consideration of said two cases in this court.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al., Petitioners.

R. E. BALL,
Attorney for Minnesota and Dakota Cattle Company, Petitioner.

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Atchison, Topeka & Santa Fe Railway Company.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 178.

Statement of the Case, Brief and Argument of Petitioners,

Empire State Cattle Company, et al.

STATEMENT OF THE CASE.

This case, and the case immediately following it, namely, *The Minnesota and Dakota Cattle Company* v. *The Atchison, Topeka and Santa Fe Railway Company*, No. 179, were and are companion cases. The two ceses were brought at the same time in the trial court and were tried together by the court with the same jury. The evidence which is set out in the Bill of Exceptions in this case was introduced in both cases, and the evidence and

instructions given and refused, with all of the rulings thereon, were the same in the trial court in both cases, and the Bill of Exceptions in this case is identically the same, word for word, with the Bill of Exceptions in The Minnesota and Dakota Cattle Company case. Separate Bills of Exceptions, exactly alike, were filed in the two cases and separate writs of error and citations were sued out and served, and complete transcripts in both cases were filed in the U. S. Circuit Court of Appeals, 8th Circuit, and the cases now come before this court by writs of *certiorari* from this court to that court of appeals, but it is the understanding and agreement in this court, as it was in the trial court and in the court of appeals, that the two cases are to be heard by this court and submitted together. It has been arranged that while there are separate statements and briefs, they will be printed in this one book under the same cover. While the counsel of The Minnesota and Dakota Cattle Company will make a separate statement, brief and argument, following this statement, brief and argument in this case, we have thought it best to make this statement at this point so that the court, in reading this statement, brief and argument in The Empire State Cattle Company case, may have in mind the identical propositions of fact and law in The Minnesota and Dakota Cattle Company case. About the only difference between the case of The Minnesota and Dakota Cattle Company case and this consists in the fact that while the cattle in both cases were shipped out from Texas about the same time, the cattle in The Minnesota and Dakota Cattle Company case were stopped for feed and water at Wellington, while the cattle in this, The Empire State Cattle Company case, were stopped for feed and water at Strong City. Another difference is the claim of the railway company that some of the Minnesota company

cattle were delivered to the Missouri Pacific Railway Co. The history of the case in the Circuit Court of Appeals, and the arguments urged in support of a reversal of its judgment fully appear in our printed petition for the *certiorari* granted herein, to which petitions we here refer and which we hereby make a part of this statement, brief and argument. See appendix herein containing a reprint and copy of said petition for the *certiorari.*

With this preliminary statement of both cases, we will now proceed with the statement of this, The Empire State Cattle Company case as tried in the trial court.

This is an action at law, tried in the trial court by the court with a jury.

The suit was brought in the trial court by plaintiffs in error and petitioners as plaintiffs, against the defendant railway company as defendant. The action was brought to recover damages for the negligence and wrong of the defendant respecting a shipment of cattle by plaintiffs over the defendant's railway.

The defense of the defendant was and is that the injury to plaintiff's cattle while being shipped over defendant's railway was due to the flood at Kansas City in May, 1903, which is pleaded and relied upon by defendant as an act of God, and as an excuse for the injury to plaintiffs' cattle.

At the conclusion of all the evidence, the trial court gave a peremptory instruction to the jury to return a verdict for the defendant, and plaintiffs excepted at the time to the giving of this peremptory instruction, and the jury having rendered their verdict accordingly, and final judgment having been given by the court thereon in favor of defendant, the plaintiffs in due time filed their Bill of Exceptions containing all the evidence and their

exceptions, and the case came to the Court of Appeals by writ of error and citation. (Record, pages 1 and 2.) The Court of Appeals gave a judgment of affirmance, and the case comes here by writ of *certiorari*. (690, Rec.)

The petition of the plaintiffs was filed in the lower court, November 13, 1903. (Record, pages 3 to 8.) The petition states that the plaintiff, Empire State Cattle Company, was and is a corporation, created and existing under the laws of South Dakota, with its principal offices in that state, and that said cattle company, and the other plaintiffs, were and are citizens and inhabitants of said state of South Dakota; that the defendant railway company was and is a corporation, created under the laws of the state of Kansas, with its principal place of business at Topeka therein, and that the defendant railway company, in 1903, and at the other times mentioned in the petion, owned and operated as a common carrier a railway from Amirillo, Texas, to Atchison, Kansas, by way of Topeka, Kansas, and that as such defendant engaged as a railway company in the transportation for hire of passengers, freight and live stock over said railway.

The petition of the plaintiffs stated the following further facts: That on May 25th, 1903, plaintiffs were the owners of 798 head of cattle, at Hereford, Texas, and the plaintiffs shipped from said Hereford said 798 head of cattle for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made over three lines of railway, to-wit, from Hereford, Texas, to Amirillo, Texas, over the Pecos & Northern Texas Railway; from Amirillo, Texas, to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company. Said 798 head of cattle were delivered to defendant at said Amirillo, Texas, for

shipment over defendant's railway to Atchison, Kansas, and to be there delivered by it to said connecting railway company, and said defendant on May 25th, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amirillo, Texas, to said Atchison, Kansas, over its line of railway between those points; and said 798 head of cattle were transported by defendant as such common carrier from Amirillo, Texas, to Strong City, Kansas, which was and is a station on defendant's line of railway between Amirillo, Texas, and Atchison, Kansas, and at said Strong City, Kansas, on May 26th, 1903, said 798 head of cattle were by defendant unloaded to be fed and said 798 head of cattle having been fed at said Strong City, on the night of May 26th, 1903, the same were ready to be reloaded and for the transportation and carriage thereof to be resumed and continued on the morning of May 27th, 1903. That at and prior to the morning of May 27th, 1903, and in consequence of the continuous rains which had prevailed over Colorado, Kansas, Nebraska, Iowa and Missouri, an unprecedented flood had commenced in the waters of the Kaw and Missouri rivers, extending from the source of the Kaw river to its mouth, and extending down the Missouri river to a point where said Kaw river empties into said Missouri river. That said 798 head of cattle were detained by said defendant at Strong City, Kansas, from the morning of said May 27th, 1903, to May 29th, 1903, and during the time of which detention, defendant twice loaded and unloaded from the cars in which they were being transported said cattle of plaintiffs. That during all of the time of said detention of said cattle at Strong City, Kansas, said flood in both said Kaw and Missouri rivers was daily and hourly becoming higher, as defendant's officers and agents well knew. That on said 29th day of May, 1903, defendant again reloaded said cattle at

Strong City, Kansas, and instead of continuing their transportation to said Atchison, Kansas, by way of Topeka, Kansas, on its regular line, deviated on its, the defendant's own motion, the transportation of said cattle by carrying them to Kansas City, and that on the arrival of said cattle at Kansas City, on the morning of May 30th, 1903, defendant, instead of leaving said cattle on the uplands where they would have been safe from the continued rise of the said flood in said Kaw river, deposited said 798 head of cattle in pens along by the side of the said Kaw river and near the mouth thereof, and where, as defendant and its officers and agents well knew, the waters of said flood in said Kaw river for several days had been continually rising, and at which point in said Kaw river, on said May 30th and 31st, 1903, said flood reached its climax, and extended far back from the ordinary channel of said Kaw river from each side thereof so as to fill and cover the said pens in which defendant so deposited said 798 head of cattle of plaintiffs.

It was further stated in said petition, that on May 31st, 1903, defendant, in order to save said cattle from being drowned, drove the said 798 head thereof into the viaducts extending over said pens and above the waters, which in consequence of said flood had submerged said pens, and that in so driving said cattle into said viaducts, defendant mixed and intermingled said 798 head with 2,200 head of other cattle that were in said pens at said time, and that said 798 head of cattle remained in said viaducts from said May 31st, 1903, to June 7th, 1903; that said waters, so made by said flood, extended from said May 31st to June 7th, back from said pens a distance of three-quarters of a mile and more, and were of a depth from eight to fifteen feet, and that in consequence of said waters, and of the placing of said cattle in said

viaducts, it was impossible to feed or water said cattle during said period of seven days; that by reason of the location of said cattle and the mixing of the same with said 2,200 head, it was impossible for either defendant or plaintiffs to sufficiently feed or water said 798 head of cattle; that by reason of said insufficient feeding and watering of said 798 head of cattle 99 head thereof died; that all of said 798 head of cattle, both at the time of their shipment at Hereford, Texas, and at the time they were shipped from Strong City, Kansas, were in good condition, and were each worth the sum and price of $25.00, and that by the death of said 99 head of cattle plaintiffs sustained a loss of $2,475; that by reason of the driving of said cattle in and on to said viaducts, 8 head thereof were fatally injured and crippled so as to rendered them totally valueless, whereby the plaintiffs lost the further sum of $200. That after deducting from said bunch of 798 head said 99 head, and said 8 crippled head of cattle, there remained 690 head, but that said 690 head were so injured and damaged by reason of the said insufficient feeding and watering of the same, as to cause a diminution in value of each said 690 head in the sum of $10 per head, so that plaintiffs lost on said 690 head the further sum of $6,900.

The petition of plaintiffs shows further damages, making the entire loss of plaintiffs in excess of $12,000.

The petition further avers that it was the duty of defendant as such railway company and common carrier to exercise due and reasonable care in the carriage and transportation of said cattle from Amirillo, Texas, to said Atchison, Kansas, but that defendant was guilty of negligence in the following particulars, to-wit:

1st. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th,

1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2nd. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided, so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3rd. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiff's consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4th. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5th. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly

and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

The concluding averments of plaintiffs' petition were, that by reason of the foregoing facts plaintiffs had sustained damage in the sum of $15,000, for which sum, together with costs of this suit, plaintiffs prayed judgment. The foregoing constitutes the substance of plaintiffs' petition.

The answer of defendant, which was filed April 22nd, 1904, contains, first, a general denial of every allegation contained in plaintiffs' petition.

The second paragraph of defendant's answer professes to be a special plea or special statement of facts and circumstances attending this shipment and accompanying the answer was the shipping contracts, marked exhibits "A," "B" and "C," filed therewith, upon which the cattle of plaintiffs were shipped. Said paragraph of defendant's answer shows that said contracts were made with the Pecos & Northern Texas Railway Company, for transportation, as averred in plaintiffs' petition, by that company from Hereford, Texas, to Amirillo, Texas, and said answer admits that defendant received said cattle for shipment over its line of railway to be delivered by defendant to a connecting carrier for transportation and to be delivered at the point of destination, and that paragraph concludes with the plea that the injuries complained of to said cattle were caused by the flood of May 30th, 1903, and that said flood was in its nature unusual, extraordinary and unprecedented, and that the injuries were proximately caused by said flood as an act of God, and was not proximately caused by any negligent act or omission on the part of the defendant railway company

in the transportation of said cattle. The concluding paragraph of defendant's answer pleads that plaintiffs wholly failed and neglected to give notice to defendant in writing of plaintiffs' claim for damages to said cattle to any officer of defendant company, as provided in the 8th paragraph of said shipping contract. The answer of the defendant and said shipping contracts may be found in the record from pages 9 to 19 thereof. To said answer plaintiffs filed a reply, denying each and every allegation, averment and matter of whatsoever kind in said answer contained. (Record, pp. 19 to 21.)

Plaintiffs in their reply by way of reply to the last paragraph of defendant's answer, respecting the subject of notice, stated, that on June 8th, 1903, and as said flood was subsiding at Kansas City, and while plaintiff's cattle were still in defendant's possession, and after both plaintiffs and defendant knew that a large number of plaintiffs' cattle had died by reason of the matters set up in plaintiffs' petition, and after plaintiffs and defendant both knew that the residue of plaintiffs' herd had been greatly damaged as mentioned in plaintiffs' petition, but before either plaintiffs or defendant knew the exact number of cattle that died, or either the exact or full extent of the injury to the residue of said herd, plaintiffs delivered to W. A. Combs, assistant general live stock agent of the defendant, at Kansas City, Missouri, a notice in writing, notifying defendant that plaintiffs would claim damages for injuries to said cattle mentioned in plaintiffs' petition, such damages resulting from negligence of the defendant, its officers, servants, agents and employees in the handling and shipping of said cattle.

It was further stated in said reply that thereupon defendant notified plaintiffs that the residue of said herd of cattle could not be safely transported to the point of their destination in South Dakota without being first

pastured in some good pasture, so that said cattle could recuperate from their feeble condition, so as to be able to be transported to said destination; that thereafter and on June 10th, 1903, plaintiffs served on said defendant at said Kansas City, through said Combs, as such general assistant live stock agent, a notice and consent that defendant might temporarily, before continuing the shipment of said cattle to said destination, put said cattle, or the residue thereof, upon pasture, and consented that defendant might do so at the expense and risk of defendant, and that in giving such consent, all rights were reserved to plaintiffs as they existed before said consent was given, that no right under the contract of shipment, and no right to damages either to said cattle, in detail, or otherwise, was waived. It was further stated in said reply that repeated demands were made at Kansas City by defendant through defendant's general attorneys, at said Kansas City, to plaintiffs, to consent to take said cattle from said defendant and relieve defendant from further shipment of said cattle, but that plaintiffs steadfastly declined so to do, and that on or about the first day of July, 1903, defendant took the remnant of said herd to its pastures at Emporia, Kansas, and kept said cattle on its pasture at Emporia, Kansas, until July 15th, 1903, when defendant resumed the transportation of said cattle over its line of railway to the point of destination in connection with the connecting carrier. That at the time defendant resumed the shipment of said cattle from defendant's pasture at Emporia, Kansas, defendant requested plaintiffs to give, and plaintiffs gave, defendant a certain obligation in writing whereby plaintiffs bound themselves to pay to defendant certain charges which defendant claimed should be paid by plaintiffs if in any proper litigation in court it should be held that plaintiffs were liable to pay said charges for the keeping of said

cattle in the stock yards in Kansas City, and in said pastures of defendant at Emporia, Kansas.

It was further stated in reply that, on July 25th, 1903, plaintiffs gave defendant an itemized list of damages claimed by plaintiffs as stated in the petition herein; that plaintiffs prior to said July 25th, 1903, were unable to give defendant said itemized list, but that during all of said period from June 1st, 1903, to July 25th, 1903, defendant had full knowledge of the injuries to plaintiffs' cattle complained of in the petition in this cause, and had frequent and continuous negotiations with plaintiffs with reference to said cattle and the damage and injury thereto, and the reply of plaintiffs concluded with an averment that defendant waived the giving by plaintiffs to defendant of any other notice than those which were given as specified in said reply.

The case was tried by the trial court with a jury in January, 1905 the trial continuing for a period of nine days from January 16th, 1905, to January 25th, 1905. (pp. 21 to 28, Record.)

The bill of exceptions in the case extends from page 29 to page 656 of the printed record, and said bill of exceptions contains all the evidence offered by both parties at the trial (p. 637, Record). Said bill of exceptions also contains thirteen instructions which were prayed by plaintiffs to be given by the court to the jury, and the refusal of the court to give said thirteen instructions and plaintiffs' exceptions thereto (pp. 638 to 644, Record). Said bill of exceptions also contains the written opinion of the learned trial judge, given by him in sustaining defendant's motion for a peremptory instruction to the jury (pp. 645 to 655, Record).

The testimony at the trial below, and set out fully in the bill of exceptions, shows the following facts: A stipulation was read between the parties that said Em-

pire State Cattle Company was, and is, a corporation, created under the laws of the state of South Dakota, and that said cattle company and said other plaintiffs were and are all residents of and citizens of the state of South Dakota, and that defendant was, and is, a corporation duly created and existing under the laws of the state of Kansas, and a resident of that state (Record, pp. 29 and 30).

We will first give in this statement a history of the rise and climax of the flood of May, 1903, and the knowledge of defendant of that flood at and prior to the reception by defendant for shipment of plaintiffs' cattle.

One of the plaintiffs' witnesses at the trial was Mr. Patrick Connor, of Kansas City, Missouri, who in 1903, and for some time prior thereto and since that time had charge of the United States Weather Bureau office at Kansas City, Missouri (p. 300, Record). Mr. Connor testified in substrance as follows:

That the Republican and Smoky Hill, Saline, Solomon and Big Blue rivers all empty into the Kaw river, and that said other rivers drain practically the north half of Kansas, and also the southern part consisting of the two lower tiers of counties of Nebraska, and also a small portion of Colorado. That the rainfall which in the aggregate brought on the flood of 1903 of the Kaw river and at Kansas City, Missouri, commenced to fall and started in April, 1903; that any rains that saturated the ground would tend to diminish the capacity of the ground to hold moisture, but the chief rains which brought on that flood fell in the month of May. That the rains which fell in the first half of May, 1903, were quite heavy. A tabulated report made by the witness of the rainfall during a portion of the month of May was given in evidence and may be found at page 300 of the record. Mr. Connor testified that the average fall of rain during the first

fifteen days of May was much heavier than usual. That the rainfall during the month of May was unusually heavy and that it averaged from two and a half to three inches in the western part, eight to ten inches in the eastern part, in excess of the normal amount that falls during the month of May. That the rains through the month of May, 1903, were quite general throughout the month; that there may have been a cessation of rains about the 15th to the 18th. That there was not much diminution of rain except the first few days in the month of May, probably two or three days, or three or four days, and then a slight cessation around the middle of the month; that otherwise the rains were continuous, according to the best of his recollection; that the rainfall at nights was the same as in the day times. Said statement furnished by Mr. Connor also shows the stages of the water each morning in May, 1903, at the foot of the Hannibal bridge in Kansas City, which bridge is the one used by the C., B. & Q. Railroad Company. Mr. Connor further testified that during the last eleven days of May, 1903, the enormous quantity of nearly seven inches of rain fell in the central and eastern thirds of Kansas, not scattered downpours, but general rains during that period; that the normal rainfall at Kansas City during May of each year is little more than four and one-half (4½) inches (page 320, Record). Mr. Connor also furnished a table of the rainfall during May, 1903, at Manhattan, Kansas, on the Kaw river, and his table shows that the total rainfall at that place in May, 1903, was 9.6 inches (pages 317 and 322, Record). That on Tuesday, May 26th, 1903, witness commenced to issue warnings of the rise of the flood, and with these warnings were made between four and five hundred maps, which were sent out daily from his office about 10 o'clock each morning, and that those maps were furnished to large bus-

iness institutions, and a number of them were mailed within the limits of Kansas City, Missouri, and Kansas City, Kansas, and that the remainder were sent outside of Western Missouri, and over the state of Kansas pretty generally; that nearly all of the business institutions of any consequence had been on the map list of the United States Weather Bureau at Kansas City for years which received maps of this kind, and that the Kansas City Stock Yards Company was one of those cases. The warnings so given by the witness during the flood of 1903 were identified by him and introduced in evidence, and may be found from page 301 to page 303 of the record.

Respecting these warnings Mr. Connor testified it was the wish of his office to give just exactly to the public the cause or causes leading up to the flood and the augmentation or diminution each day, and the consequences are always referred to, the character of the water which obtained over that territory whenever mentioning the flood question as to whether or not rains had occurred and whether or not they were light or heavy. In substance the witness stated in these reports that owing to the tremendous quantity of water which had fallen it would necessarily raise or cause a flood at Kansas City.

Respecting a question asked Mr. Connor how long it would take water at a certain height in the Kaw river at Topeka to obtain the same height at Kansas City, Missouri, Mr. Connor answered, it would not take very long, and that the crest of the flood moved at the rate of two miles and six-tenths per hour in the Kaw river. The distance from Topeka to Kansas City is about sixty miles, and according to this testimony it would take about twenty-four hours for the flood at Topeka to reach the same height at Kansas City.

Mr. Connor further testified that taking into consid-

eration the differences in the height of the valley of the Kaw between Topeka and Kansas City, it would take about thirty hours in the case of a great flood for the flood at Topeka to reach Kansas City.

Mr. Connor further testified that the flood in the Kaw river of 1881 attained a stage of 26 and .2 feet above zero. He further testified that there was practically no flood condition north of St. Joseph in the Missouri river in 1903; that there was not much damage from flood between St. Joseph and Atchison, Kansas; that the flood between Atchison, Kansas, and St. Joseph, Missouri, was moderate; that from Leavenworth south the flood in the Missouri river was more severe. He also testified of the flood of the year 1904, and that the flood of the latter year was nine or ten feet below the height of the flood of 1903 (Record, 320).

Another witness in the case was T. B. Jennings, who has charge of the United States Weather Bureau of the state of Kansas, with office at Topeka, Kansas. Mr. Jennings has held that position since 1886. His testimony may be found at page 219 of the record.

Mr. Jennings testified that the rainfall for the first twenty days of May, 1903, averaged about four inches, or possibly a little over four inches, through the territory east of Norton and Trego counties, north of Smoky Hill river; then from the 21st to the 28th of May, 1903, it averaged another four inches, and on the 28th of May came the tremendous rainfall, which was about five inches and a quarter at Salina and was evidently considerable more, because that washed out the rain gauge in Abilene and the river was already bank full when this water came. That "we got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next seven days that was repeated and on the 28th we had the tremendous downpour in the cen-

tral counties extending from Saline county northeastward into Marshall. About the normal amount of rain for the month of May fell during the first twenty days.

The territory I have in mind in what I have stated above as to rainfalls during the month of May, is the territory east of Norton and Trego counties and north of the Smoky Hill and Kaw rivers; it is the Kaw river watershed. The Smoky Hill passes through Trego and the Solomon and the forks of the Republican cut through this way, and it is the counties east of that portion of the state. The rainfall that I have described is in the Kaw river watershed; I am giving the rainfall that fell in the territory that flows its waters into the Kaw river finally; the Kaw draws from ten miles south of the Platte river in Nebraska; draws all the water to ten miles south of the Kaw in Kansas; in other words, the Kaw river watershed is all on the north side of the river. The most of the rainfall the latter part of May occurred on the 28th; there was but little rainfall west of Manhattan after that; we had a rain Sunday, the 31st; it rained up to Sunday here, Sunday the 31st.

We received a request from the Kansas City stock yards on the 29th and 30th to wire them the conditions every three hours; all we could do was to wire them the rise of the river from one period to another because there was no gauge here. The main streams that flow into the Kaw above Topeka are the Blue river, which comes in at Manhattan, the Republican river, which comes in at Junction City, and the Salina and the Solomon; the Solomon comes in at Solomon City; the other streams are mainly creeks; the Smoky Hill and Kaw rivers are one and the same stream; that is they commence calling it Kaw river after the Republican joins the Smoky Hill at Junction City; the Saline and Solomon rivers rise in the western counties of Kansas, Trego and Sheridan

counties; the Republican rises in the eastern part of Colorado and the northwestern part of Kansas; the Blue rises up in Nebraska, in the neighborhood of Lincoln, that is it covers quite a block of counties south of Lincoln, Nebraska."

Another witness for the plaintiffs was W. E. King (Record, 223), assistant city engineer, of Topeka, Kansas. Mr. King testified that the rains in the month of May, 1903, were exceptionally heavy; "we had considerable work here in the city, and were laid out by the continuous rains. I took the first observation in the rise of the Kaw river at Topeka on the morning of May 28th, at 8:30 o'clock; the Kaw river was then 6.0′ above city datum; that is a base from which we establish to make calculations; it is an imaginary base that is 10.8′ above low water mark; low water mark is the stage of the river at ordinary times. When I say that the water was 6.08′ above city datum, that means 16 feet and .88 or eleven inches above low water mark on the morning of the 28th at 8:30. The Kaw river continued to rise after that. I kept men stationed at that point until the crest of the flood; I have a thirty minutes continuous report from May 28th at 8:30 to June 6th at 10:30. The crest of the flood was reached at 9 p. m. May 30th; between 8:30 the morning of the 28th and 9 p. m. of May 30th the water rose ten feet and one-tenth."

Another witness for the plaintiffs was Theron S. Cafferty (225, Record), of Topeka, Kansas, and who was roadmaster of the defendant since 1887. Mr. Cafferty testified that he remembered the flood of 1903, in the Kaw river, and when the defendant's railroad from Topeka to Atchison became impassable on account of said flood. He testified that it became impassable on May 29th, 1903; that the last train that went from Topeka to Atchison left Topeka May 29th at 6 a. m., and

at that train got as far as Valley Falls, which is a sta-
on between Topeka and Atchison, and that witness saw
e condition of things there was so bad that he sent this
ain to Leavenworth and that he came back to Topeka
a hand car; that that train which left Topeka on the
orning of May 29th was the last train from Topeka to
tchison until the flood subsided. That the tie-up of all
ssenger trains, freight trains and stock trains for Atch-
on at Topeka began on the 29th; that there was no ob-
ruction on that line prior to the 29th from Topeka to
tchison."

Another witness for plaintiffs was W. A. Dyal (290,
ecord), of Topeka, Kansas. Mr. Dyal testified that
was in Topeka, Kansas, in May and June, 1903, and
membered the flood. That he was in the scrap iron
d metal business at 214-216 North Kansas avenue;
at his place of business was five hundred feet from the
aw river on the south side. "I could not get to our
ace of business on May 30th. I know the rainfall along
e Kaw river at Topeka, and in Kansas, during the
onth of May, 1903, was very heavy; it began to be
avy along about the 15th of May, I should judge; I
ould say that the rain continued from the 15th of May
heavy; the river kept rising, the rains after the 15th
ust have been pretty heavy up the Kaw judging from
e way the river came up; the river began to rise at
kepa along about the 15th, possibly as late as the 20th
May; I should say the grade floor of our building was
the neighborhood of 18 or 20 feet above the Kaw
er at low water mark; the water reached our grade
or the night of the 29th of May; the height of the
ter on the 20th of May was high, I couldn't say how
gh; if I remember right the water did not fall much
ter it commenced rising; we were preparing to get
ay, and the river kept up so I staid at home on ac-

count of it. I should say it commenced to get high between the 15th and 20th; the flood got four feet higher than our grade floor. It reached that height of four feet above our grade floor I suppose about the 30th, we could not get down there after I left there the night of the 29th about 10 or 11 o'clock, and it was just commencing to get in our grade floor, then the morning of the 30th I could not get there."

Another witness for the plaintiffs was C. T. McLellan (Record, 292), of Topeka, Kansas, wo was and is division superintendent of the defendant railway company. His division as such superintendent included the defendant's railway from Argentine to Emporia, by way of Topeka, and from Holliday to Emporia and by way of Topeka to Atchison and St. Joseph and Wilder to Hawthorne by way of Leavenworth and Alma branch, Burlingame to Alma.

Mr. McLellan testified he remembered the flood of 1903, and that we had frequent rains and some of them heavy in the month of May, 1903; that about the 27th or 28th of May he got reports from the Rock Island office in Topeka by 'phone as to the conditions of the water in the vicinity of Manhattan; that on the 27th of May witness was at Lakeview, on defendant's line of railway, between Lawrence and Topeka, and that these telephone communications to Topeka from Manhattan by way of the Rock Island were telegraphed to witness at Lakeview by his chief clerk in his office at Topeka; that at that time he was protecting the right of way between Lakeview and Lawrence where the river was high; that in consequence of the rains and the flood, the last time the trains passed over defendant's road between Topeka and Lawrence was on the morning of May 29th, 1903, about 4:30 and 5:30 in the morning; that was the last wheel that moved on the track between Topeka and Law-

rence during that flood period. No other trains passed over that line until the 8th of June. "A stock train leaving Strong City and coming to Kansas City over that line could not have come over our road by way of Topeka after 5 o'clock Friday morning, May 29th. I was attending personally to the work, looking after flood conditions on the different points of our road between Topeka and Kansas City and I was getting reports from every point on the division where we were threatened. The Kaw river at Topeka, I think, commenced to rise early in May, but the rise was very gradual and slow. I think by the 14th or 15th, middle of the month, the flood was rising slowly; there was not a steady rise, there was times when it was at a standstill and fell slowly. The rains during the period were very nearly continuous. I tried to keep fully informed from time to time of the state of the weather at Topeka. The track between Lang and Emporia was flooded on the 30th and a portion of the 31st of May. Our trains discontinued running between Topeka and Emporia the morning of May 30th. Lang is on our main line between Emporia and Topeka about eight miles east of Emporia." Being asked up to what time the trains continued to run from Strong City to Emporia and Topeka up to Atchison, the witness answered, "we discontinued train service to Atchison on the morning of the 29th, that the last train that went through was a freight, which left Topeka about 3 o'clock in the morning and reached Atchison about 8 o'clock the same morning. In consequence of the floods, the running of trains was discontinued after the morning of the 29th between Topeka and Atchison, between Topeka and Leavenworth and between Topeka and Kansas City; trains between all those points on our road were discontinued on the morning of the 29th; the running of trains on our road from Wilder to Leavenworth were also

discontinued; all of the lines of the Santa Fe system in Kansas, north of the Kaw river, were discontinued on the morning of May 29th; we were still open and operating trains between Holliday and Kansas City. Our lines from Topeka to Atchison became flooded at Valley Falls. The Delaware river, which is one of the tributaries of the Kaw, overflowed the main line at Valley Falls; the Delaware river empties into the Kaw river opposite Lecompton, sixteen miles east of Topeka. The track of our railroad at Topeka was flooded and the track became impassable at noon on the 29th. There was a break across the Kaw river on our road, in the direction of Atchison, at Topeka, and at noon on the 29th I was informed by the office force of our company that they had not been able to put anything over the Kaw at Topeka after train 122, which left Topeka at 3 a. m. that morning. The water was over our road at Holliday all day on the 29th; there is a sag in the track of our road at that point, the railroad is low and the bank of the river is low. The last train over our road at Holliday was a stock train and went over our road at that point about 10:15 or 10:30 the night of May 29th, east bound; that train came to Holliday by way of the Ottawa cut-off from Emporia to Holliday. After the morning of May 29th there was no trains came east by way of Holliday except by that cut-off."

The witness further testified that the business of the defendant railway company is and during its entire existence has been that of a common carrier engaged in the carrying of passengers and freight for hire.

He further testified that the office of the general superintendent, train master, and of the witness as division superintendent, C. W. Cook as assistant general freight agent, and W. J. Hurley, both at the time of the giving of witness' testimony and in the year 1903, were

and had been at Topeka, and that these gentlemen in May and June, 1903, had their offices in the Atchison, Topeka & Santa Fe Building, opposite the capitol in Topeka, Kansas.

Another witness in the case, who testified as a witness for the defendant, was H. W. Sharp (Record, 593), of Kansas City, Missouri, who was general superintendent of terminals of defendant at Kansas City. He testified that Mr. J. E. Hurley, the general superintendent of the defendant railway company, with offices at Topeka, was with witness on Saturday, May 30th, and the night following; that superintendent Hurley went with witness to Argentine, which is a suburb of Kansas City, about 10 o'clock Saturday morning, May 30th, 1903; that Mr. Hurley and witness started from the Santa Fe freight house at the corner of Hickory and Joy streets, in Kansas City, Missouri, to go to Argentine, on the top of a box car, so that they might see the extent of the water as much as possible; that superintendent Hurley and witness went to Argentine at that time to size up the situation and see the extent of the water and figure on the probable and possible further rise; that they rode on top of the car to get a better and plainer view of the surroundings.

Witness Sharp further testified that Mr. Hurley was in communication with the Santa Fe Topeka offices during Saturday in regard to the flood situation; that the witness saw the telegrams which passed between Superintendent Hurley and the Topeka office in regard to the flood; that witness talked personally with Superintendent Hurley about the flood situation; that the meeting of witness and Superintendent Hurley on Saturday was for the purpose of discussion of the flood situation. "Some parts of our railroad between Topeka and Kansas City were under water at that time. Superintendent Hurley

and I staid at Argentine that morning some time, we left Kansas City about 10 o'clock and got back about 12:30 o'clock; the condition at Argentine while we were there was pretty hard; there was about four inches of water over the rail of the main line, just west of the Rex Mills; there was about the same amount of water there was at Argentine. Rex Mills is between Argentine and Kansas City; there was no water at that time at Kansas City on our tracks. Superintendent Hurley and I thought from the information which we had that the crest of the flood had about reached Argentine, and we figured that even in the lowest part of the yard, we believed if we got as much as two feet more, that the contents of the cars would not be damaged; Argentine was our storage yards and unloading yards for all business passing through Kansas City. Our yards at Kansas City and Argentine both had something over fourteen hundred loads and sixteen hundred empties; most of them were at Argentine. We estimated at 12:30 Saturday, May 30th, that we could stand a further rise of two feet or two and a half feet without injury to the property in our yards."

The witness further testified that along in the evening of the same day, probably along from 6 to 7 o'clock. he first obtained information from Argentine yards as to the dangerous condition of the flood there. Witness says in this connection, the water seemed to be rising right along, still rising slowly and it continued to rise slowly all the evening, until 8 or 9 o'clock in the evening the water was getting up pretty well.

Witness further testified that about 4 o'clock in the afternoon of May 30th they commenced moving out of their yards at Argentine their engines and coaches to the south end of the Kansas City yard right along north of the mule barns of Sparks Brothers. "The place to which we moved those engines and cars from Argentine was

the highest land in the Kaw valley available for moving cars and engines."

Said J. E. Hurley, the general superintendent of defendant, was also a witness in the case (Record, 172). Mr. Hurley testified (Record, 196) that the last train between Topeka, Kansas, and Atchison before the high water was train No. 122, which left Topeka at 3 o'clock a. m. May 29th; the track between Strong City and Emporia was not disabled.

There was other testimony in the case in relation to the flood and its continuation during said month of May, 1903, and the knowledge by the defendant, its officers and agents, but we will not pursue the statement thereof any further here, but the same will appear incidentally from the other facts brought out in the testimony and referred to hereafter.

Respecting the first specification of negligence in the plaintiffs' petition, that the defendant did not exercise due and reasonable care, but was negligent in the detention of the cattle at Strong City from May 27th, 1903, to May 29th, 1903, in not carrying and transporting said cattle on May 27th from Strong City to Atchison by way of Topeka so that said cattle might have been by defendant at said Atchison delivered to the continuing and connecting carrier, the testimony was as follows:

One witness for the plaintiffs was W. H. Frost (Record, 37). Mr. Frost was one of the plaintiffs and accompanied the shipment of cattle mentioned in plaintiffs' petition from Hereford, Texas, to Kansas City. Said Frost represented the plaintiffs as owners of said cattle and had a man with him looking after the shipment of the cattle by the name of Albert Newton. Mr. Frost testified that he bought this train load of cattle about one hundred miles south of Hereford, Texas; that there was 798 head in the train; that these cattle were

loaded at Hereford, about 9:30 p. m., May 25th, 1903; that the train carrying these 798 head of cattle consisted of 21 cars. That the train carrying said cattle was taken over the line of the Pecos Valley railroad from Hereford to Amirillo; that said train reached Amirilla about 11 o'clock in the evening of May 25th; that after remaining at Amirillo about an hour the cars containing said cattle were taken over the line of the Atchison, Topeka & Santa Fe railroad to Strong City, and there unloaded; that said train reached Strong City about 11 o'clock in the evening of Tuesday, May 26th; that said cattle were unloaded at Strong City by a crew in the stock yards of the defendant at that place; that the said cattle were fed and watered the morning of May 27th about 8 or 9 o'clock, and that said cattle could have been loaded out from Strong City at 11 o'clock a. m. on Wednesday, May 27th.

Witness further testified that nothing was done with the cattle at Strong City until the evening of the 27th, when they were reloaded out for transportation; that the train containing the said cars was pulled down on the sidetrack and set on the track awhile and then ordered back; that they were loaded about 4 o'clock that evening and remained on the side track about an hour and then the train was backed up and the cattle unloaded again in the yard. That witness was not consulted at any of the times when the cattle were unloaded or reloaded and unloaded again; that said cattle were reunloaded the second time about 7 o'clock Wednesday evening, May 27th; the cattle were then put back in the yards.

Witness further testified that the cattle were reunloaded again the next day in the forenoon, but that the entire train was not loaded up at that time; that witness thinks that about half of the cattle were loaded up at that time; that they consumed perhaps half an hour in load-

ing up at that time; then the cattle were again put back into the yards. "I was not consulted in the unloading or loading up again by anybody." The cattle were again loaded up on Friday morning of the 29th of May, 1903, about half past 7 o'clock, or 8 o'clock. The cars containing the cattle were loaded and run down on the side track, where they remained about three hours, then they were pulled out about one or half past one that day to go to Emporia.

Thus it will be seen by the testimony of Mr. Frost, one of the plaintiffs in the case, that plaintiffs' cattle were detained at Strong City from Wednesday until Friday. Mr. Frost testified, as we have seen or page 39 of the record, that the cattle had finished being fed and watered and were ready for transportation to be resumed at 11 o'clock on Wednesday, May 27th, 1903; he testified that the cattle were still held at Strong City until one or half past one of Friday, May 29th (Record, 41), when they pulled out to go to Emporia. This testimony shows therefore, that the cattle were detained two whole days at Strong City, Kansas, and the contention of the plaintiffs is that the defendant company had ample time during that two days by continuing the transit of the cattle to have shipped them out so as to have delivered them to the connecting line at Atchison, and that if that had been done, the cattle would have reached their destination at Evarts, South Dakota, without injury or damage from the flood.

In this connection we desire to call the attention of the court to the testimony of two witnesses, one G. W. Cloyd (Record, 31). Mr. Cloyd's testimony shows that Mr. Frost, whose testimony we have just referred to, at the time he, Frost, bought the train load of 21 cars containing the 798 head of cattle in controversy in this case, bought as a part of the same transaction, another bunch

of cattle, which filled up another train load consisting of twenty cars, and the witness Cloyd was in charge of this other train load. As already stated, the two train loads were bought together at the same time by Mr. Frost as parts of one transaction and to make up one entire shipment, but the shipment was divided into two train loads. The train load in controversy was in charge of Mr. Frost, accompanied by Newton, while the other train load was in charge of the witness Cloyd, with one Keiser. The train load in charge of the witness Cloyd left Hereford about 5:30 in the afternoon of May 25th, while as we have seen the train load in charge of Mr. Frost left Hereford about 9 o'clock or 9:30 o'clock the same evening. It is thus seen that the two trains in leaving Hereford, Texas, were about four hours apart. Witness Cloyd says that his train load came over the Pecos Valley to Amirillo, which was reached about 8 o'clock the same evening; that they remained at Amirillo about forty-five minutes and that they went from Amirillo with his train to Strong City over the Atchison, Topeka & Santa Fe Ry. Mr. Cloyd further testifies that his train reached Strong City about 5:30 p. m. on the evening of Tuesday, 26th of May, and in this connection it will be remembered that Frost testified that his train reached Strong City about 11 o'clock the same day, and thus it is seen that the two train loads were about the same distance, three and a half or four hours, apart on reaching Strong City that the trains were apart when they left Hereford. The witness Cloyd (Record, 32) further testified that his train remained at Strong City until the evening of Wednesday, 27th, about 8:30. By comparing the testimony of Mr. Frost with that of Mr. Cloyd, it will be seen that the two train loads were at Strong City all day on Wednesday the 27th. Witness Cloyd further testified (Record, 35) that his train, which left Strong

City at 8:30 p. m., Wednesday evening, May 27th, went through to its destination at Evarts, South Dakota; that his train was not caught in the flood anywhere. The other witness referred to was J. D. Carr, and one of the plaintiffs in this action (Record, 116). Mr. Carr testified that the first train load of cattle, which was the train load accompanied by the witness Cloyd, and to which we have referred above, was seen by the witness Carr in Sioux City, where he met that train; that he met Cloyd's train on the last Sunday in May (May 31), and that he (Carr) accompanied the shipment of that first train load from Sioux City to Evarts, South Dakota, where that train load arrived uninjured on Monday, June 1st, 1903; that in that shipment there was 763 head of cattle of the same ages and the same kind of cattle as the cattle in the train accompanied by Mr. Frost, which is the train load in controversy.

It is thus seen from the testimony of Messrs. Frost, Cloyd and Carr that if the train load of 798 head of cattle in controversy in this case had been continued in its transit by the defendant from Strong City, the same as the transit of the other train load in charge of Cloyd was continued from Strong City, by defendant, the train load of cattle in controversy in this case would have reached its destination uninjured and that the death and injury of the cattle by the flood would have been avoided. Cloyd's testimony shows that his train was detained twelve hours or more by reports of high water and then continued from Strong City.

There is no evidence in the record controverting the foregoing facts proven by the testimony of Messrs. Frost, Cloyd and Carr; there is and can be no denial or question on the part of the defendant that if the train load of cattle in controversy had been shipped out from Strong City by the defendant, as the other train load was shipped

out, the injury to these cattle would have been avoided. The contention of the plaintiffs is that in view of the shipment out of the train load in charge of Cloyd, the detention of the train load of cattle in controversy at Strong City during the two days they were there was negligence on the part of the defendant and that that negligence either caused or contributed to produce the loss sued for in this action.

The next charge in the petition to which we desire to invite the court's attention, in the statement of facts, is the second charge that defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

The contention of the defendant in the trial court was, and the same contention will doubtless be renewed here, that the defendant was not negligent in detaining plaintiffs' cattle at Strong City said two days, said detention having been caused, as it contends, by the flood which as we have aready seen was prevailing throughout the watershed of the Kaw river.

In this connection, referring back to the testimony of Messrs. King, Cafferty, Dyal and McLellan, the substance of whose testimony we have already given above, it will be remembered that all of the lines of railway of the defendant which afforded any possible outlet to the train of cattle in controversy were flooded on the morning of Friday, May 29th, 1903. The uncontradicted testimony of Messrs. Frost and other witnesses is that the train load of cattle in controversy did not leave Strong City until Friday noon (Record, 41). The witness Newton also testified (Record, 135) that he accompanied

Frost on the train in controversy, and testifies to the same effect that the train load in controversy was reloaded on Friday, the 29th, and run out on the track until about half past one, and that they remained there about two hours and a half, and both Frost and Newton testified that during the two days that the train in controversy was detained at Strong City the railway agent of the defendant at Strong City informed them that the detention was on account of high water along the line of the defendant's railway; and since it is claimed by the defendant that the detention of plaintiffs' train load of cattle in controversy at Strong City for the two days they were held there was in consequence of the flood and high water, and since the uncontradicted evidence of King, Cafferty, Dyal and McLellan shows that defendant's several lines of railway from Emporia north going both to Kansas City and Atchison were flooded early in the morning of Friday, May 29th, plaintiffs contend that the shipment of the cattle in controversy from Strong City at noon of Friday, the 29th, with a view of encountering the flood in the Kaw river and which flood covered all the lines of railway of defendant, was negligence on the part of defendant.

This contention is emphasized by the consideration of the various telegrams between the general offices of the defendant respecting the transit of the train load of cattle in controversy. Those telegrams are eighty in number and may be found from page 178 to 194 of the record. Those telegrams are classified according to the dates, beginning with the telegrams sent on Tuesday, May 26th, 1903, and continuing down to the last telegram, which was sent on May 30th, 1903. It will be observed by an examination of all of those telegrams that they related solely to the situation of the flood as it affected this shipment of cattle. Three of those telegrams

were sent as early as May 26th. An examination of those several telegrams sent from the 26th until the 30th of May will show that the movements of this train in controversy all emanated from the general offices, and under the direction of the general superintendent, Mr. Hurley, and other general officers of the defendant at Topeka, Kansas, and those telegrams show that the situation in regard to the movements of the train in controversy were so exceptional as to call forth from the first arrival of the cattle at Strong City the interposition of the general officers of the defendant company. Twenty-four of those telegrams were sent on Wednesday, the 27th, and when read together show that the defendant, from Tuesday, the 26th, by its general officers at Topeka, were acquainted with the flood conditions in the Kaw river and along the lines of their railway, and that two days before Friday, the 29th, when this train load was shipped from Strong City, conditions were such as to make it extremely hazardous, dangerous and negligent to move those cattle from Strong City, until the flood, which the defendant knew on Wednesday, the 27th, was on, had fully subsided. Thirty-five of those telegrams passed to and from between the general officers of the defendant respecting the flood conditions as affecting the shipment of the cattle in controversy on Thursday, May 28th, 1903, and those telegrams, taken as a whole, show the extreme dangerous situation as it existed on Thursday, May 28th, and that condition was known to the general officers of the defendant railway company. The same observation is true of ten or more of the telegrams which passed to and from the officers of the defendant Friday, May 29th. These telegrams, taken in connection with the other evidence to which we have referred, make it conclusive, as it seems to us, that defendant in not detaining plaintiffs' cattle at Strong City until the

flood had entirely subsided was negligent, and that but for such negligence plaintiffs' cattle would not have been damaged as complained of in plaintiffs' petition.

We will next present the evidence which supports the 3rd specification in plaintiffs' petition, that said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point said defendant had and has no connecting line extending to Atchison, Kansas. It will be observed in this third specication two propositions of fact are stated, one that the deviation of the shipment of plaintiffs' cattle to Kansas City was wrongful and the other that such deviation was negligent. It will be conceded that if that deviation was negligent, defendant was liable to plaintiffs for the injury which ensued, and it will not probably be denied that if independently of the question of negligence the deviation without plaintiffs' consent of the shipment was *per se* wrongful, then defendant is also liable.

Upon the question whether the deviation was wrongful, we call the court's attention, first, to that part of the record which shows that the cattle in controversy were to go from Amarillo, Texas, to Atchison, Kansas, by way of Topeka, and to be there delivered to the C., B. & Q. railroad for shipment to Council Bluffs, and shipped from there to Evarts, South Dakota, by way of the Chicago, Milwaukee & St. Paul railway, and that the route thus designed, did not contemplate a shipment of cattle under any circumstances to Kansas City.

On this branch of the case we call attention, first to the contracts for shipment appended to defendant's answer as exhibits. Copies of those contracts of shipment, will be found between the blank page 12 and page

19 of the record. On the back of each one of the contracts is the following:

"Live stock contract, Hereford, Tex.,
To Atchison, Kansas.
May 25th, 1903."

This endorsement is on the back of each one of the contracts and the testimony of the witness, Newton, who accompanied the plaintiff, Frost, with these cattle, is to the effect that he saw these contracts at the time the shipment commenced, and that the contracts indicated that the cattle were to go by way of Atchison (Record, 158 to 160). The bills of lading for the train load in controversy, were offered in evidence by plaintiffs, and a copy of one of those bills of lading may be found at pages 121 and 122 of the record. The bills of lading show that the cattle in controversy, were shipped from Hereford, Texas, destined to Evarts, South Dakota, on May 25th, 1903, and that they were routetd to go by way of the junction to Amarillo and thence with the Atchison, Topeka & Santa Fe Railroad company and over that line to Atchison, where they were to be taken by the Kansas City, St. Joseph & Council Bluffs railroad, which is a part of the Burlington system, to Council Bluffs, and from thence by the way of the Chicago, Milwaukee & St. Paul to Evarts, South Dakota. This is the line over which the cattle were routed to go by the bills of lading made by defendant and the bills of lading are in harmony with the endorsements on the back of the contracts which routed the cattle to go by way of Atchison. On this point Mr. Hurley, the general superintendent of defendant company (Record, 173) testified that cattle shipped over its railway from Amarillo, Texas, to go north would pass both Strong City and Emporia, by way of Atchison; that the feeding points on defendant's railway north from Amarillo, Texas, were Wellington and

Strong City, Kansas, and at page 174 Mr. Hurley distinctly testifies that the usual and customary route from Strong City to Atchison is across the Kaw river at Topeka, and that trains pass north from Strong City to Atchison through Osage City, Burlingame, Topeka, Valley Falls and Nortonville to Atchison, Kansas, and that that is the customary route for all trains of live stock, dead freight, passenger, and everything between Amarillo, Texas, to Atchison, Kansas, and was the customary route in 1903. (See also testimony of Mr. Hurley, Record, 176.)

In that connection on that page, Mr. Hurley also testified that the deviation of the train of cattle, in controversy, in this case, from the customary and usual route by way of Topeka to Atchison, from Emporia to Kansas City, was made by his, Mr. Hurley's order, and the testimony of Mr. Hurley (Record, 195) shows that he, Superintendent Hurley, in making his several orders or telegrams and otherwise directing the movements of plaintiffs' cattle in controversy, and taking them to Kansas City, acted without any communication between him, Hurley, and anybody representing the plaintiffs, and the testimony of both Mr. Frost and Mr. Newton shows that neither of those persons were consulted in any way by any representative of the defendant company in the movement of the train of cars in controversy. All of the movements of the train of cars in controversy, whether consisting of the loading or unloading of the cattle, or the reloading, or the reunloading, or the movements or detentions, or the deviation to Kansas City, were by the defendant through its general officers, without any consultation or communication with Mr. Frost or any other persons representing the plaintiffs. The testimony of Mr. Frost on this point will be found (Record, 41) and the testimony of Mr. Newton on this point (Record, 156

and 157). There is no testimony in the record contradicting the testimony of Mr. Frost and Mr. Newton, that the defendant's officers did not consult with Mr. Frost or other representatives of the plaintiffs in connection with the movement of this train. Upon the proposition that it was within the contemplation of these parties that the cattle were to be shipped from Amarillo to Atchison, by way of Topeka, the learned trial court in its opinion in this case (Record, 653) recognized the route to Atchison as within the route originally contemplated by the parties, and the learned Judge, in his argument on that branch of the case treats the line that was originally in the contemplation of the parties as the line from Strong City to Emporia, thence by way of Topeka to Atchison.

The facts bearing upon the question of negligence of defendant company in deviating the shipment to Kansas City, are as follows: There is no evidence in the case that the yards of the defendant company at Strong City, Kansas, where plaintiffs' cattle were detained for two days, was an insufficient place at which to hold the cattle until the flood had subsided. And it must be taken as conceded that there was no necessity, in the situation of the cattle at Strong City, which required their removal from that point, and if there was any danger from a flood at Strong City, the defendant company could have escaped that danger by the removal of the cattle to pastures of defendant twenty or thirty miles distant, which were situated near Emporia, Kansas, where the plaintiffs' cattle were taken by the defendant company after the injury and damage to the cattle was inflicted. And it will not be seriously contended by the railway company that there was any necessity for removing the cattle from Strong City; they had been safely kept at Strong City for two days and could have been as safely kept there for ten or fifteen days longer until the flood had sub-

sided. (See testimony of Superintendent Hurley, pages 210-211, Record.) At the time of the removal of plaintiffs' cattle from Strong City, Friday noon, May 29th, the flood was on in the Kaw river at Topeka, all of the lines of the defendant company were flooded, and the evidence shows that the cattle of plaintiffs were taken to Kansas City, not over any of the defendant's lines, but over the line of the St. Louis & San Francisco Railway Company by Olathe, on a roundabout line of transit. The evidence of Messrs. Jennings, King, Cafferty, Dyal and McLellan, to which we have referred repeatedly in this statement, show that from May 1st to May 28th, eight inches of water had fallen in the Kaw river water shed, and that on May 28th there was the tremendous downpour of five inches, and other testimony shows that on Friday, May 29th, in consequence of the said downpour of May 28th, there was a tidal wave in the Kaw river at Topeka, of about nine feet. This was the situation when the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City. The defendant by that deviation made the effort to outrun the flood in its descent down the Kaw river from Topeka to Kansas City. Defendant company, and its agents and officers well knew of the tidal wave at Topeka, and the evidence of Mr. Connor, and the other witnesses show that that tidal wave which reached Topeka on Friday the 29th, was bound to reach Kansas City within twenty-four or thirty hours thereafter. Thus the uncontradicted evidence shows that the defendant, by the deviation, carried the cattle of the plaintiffs into certain danger and destruction by attempting to cross the Kaw river at Kansas City, when everybody knew that the crossing at Topeka was an impossibility, and that within a few hours at best, it would be likewise impossible to cross at Kansas City. The contention of the defendant is, that

defendant deviated the shipment to Kansas City because it had an arangement with the Missouri Pacific Railway Company to take the cattle from the defendant company at Kansas City and carry them to Omaha or Council Bluffs, where their transit could be continued to the point of destination. The defendant claims that it had been informed by some of the telegrams, to which we have referred, that the Burlington Railroad company, over whose line from Atchison to Council Bluffs the transit of the cattle was originally designed, could not carry the cattle from Atchison, because of the flood conditions above that point, but the Missouri Pacific railroad from Atchison to Omaha runs up the same valley that the Burlington runs from Atchison to Council Bluffs. As a matter of fact, however, the evidence shows that the defendant company did not have any arrangement with the Missouri Pacific Railroad company at the time the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City to carry these cattle from Kansas City to Omaha or Council Bluffs. This is shown by the evidence of the witness Douthitt (Record, 267). Mr. Douthitt was the live stock agent of the Missouri Pacific Railway company at Kansas City, and as shown by his testimony any arrangement respecting the transit of these cattle from Kansas City to Omaha by the Missouri Pacific Railway company would have to be made through his as such live stock agent. Mr. Douthitt is positive and emphatic that no arrangement was made between the defendant company and the Missouri Pacific Railway company for the transfer of these cattle by the defendant company to the said Missouri Pacific Railway company at Kansas City, for their continued transportation north, and that no arrangement whatever was made for the reception by the Missouri Pacific Railway company of the cattle at Kansas City. The only arrangement made with

Mr. Douthitt and the Missouri Pacific Railway company, which he represented, was for the reception of these cattle by the Missouri Pacific Railway company at Atchison. In this connection we invite attention to page 268, where a telegram is copied from C. W. Cook, the agent of the defendant at Topeka, to Witness Douthitt, at Kansas City, and which telegram reads as follows: "Account of washout with Burlington want to deliver Missouri Pacific at Atchison about three trains of cattle for Evarts, S. D., and routed via Council Bluffs, care of C., M. & St. P. Presume you will join accepting north of Atchison same division Burlington accept. Rush answer."

This telegram was sent on May 27th, and on the same day as it appears from page 269, Mr. Douthitt sent back to Mr. Cook at Topeka, the following telegram (page 269, Record):

"Yours dated Q 2.52; will move the three trains cattle, Atchison to Omaha accepting division allowed Burlington, which I understood is $13 per car; advise when shipment will be delivered our line. N. Douthitt."

We think the evidence of Mr. Douthitt taken in connection with the telegrams printed in the record will show that the defendant's general officers and agents who manipulated the movements of these cattle in this case lost their heads and became so nervous and excited as to be incapable of transacting business at or about the time of the deviation of plaintiffs' cattle from Emporia to Kansas City.

The facts to which we have called the court's attention in this statement in support of the third proposition of the plaintiffs' petition that there was a negligent as well as a wrongful deviation of the shipment to Kansas City, support the fourth specification of negligence in plaintiffs' petition.

The fifth specification in plaintiffs' petition is as follows: Defendant company wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved, the same from their position of peril aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood. This specification is supported by the following evidence at the trial of said cause. Among the witnesses in the case was a Mr. William M. Kendrick. (Record, 283.) Mr. Kendrick was the live stock agent at Kansas City of the C., B. & Q. Railroad company. This was the railroad company which was to take the cattle of the plaintiffs' as they were originally routed from Atchison to Council Bluffs. Mr. Kendrick testified that on the arrival of these Cattle Saturday morning, May 30th, he took steps to have them hauled out over the Burlington railroad from Kansas City north to Council Bluffs, but he learned in some way that it was the desire of the defendant company to ship out by the Missouri Pacific Railway company. As will be seen by the testimony of Mr. Douthitt and other witnesses, the defendant company learned early in the day of Saturday, May 30th, that the Missouri Pacific Railway company would not endeavor to take the cattle over its road, and the testimony of Mr. Kendrick, live stock agent of the Burlington (Record, 287-288), shows that the Burlington railroad, on that day had plenty of engines and cars with which to haul out these cattle from Kansas City north over the Burlington railroad to Council Bluffs. The testimony of Mr. Kendrick also shows that on Saturday evening, May 30th, 35 cars were shipped out of Kansas City on the Burlington. The testimony of Mr. Kendrick on this point is as follows:

Q. Did you send any cattle trains out by the Burlington Saturday?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepted.

Q. Do you know of any trains going out in the part of the yards where these cattle were and clearing the flood on Saturday?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled; defendant duly excepting.

A. I don't know just where those cattle were yarded; we loaded out cattle there on Saturday evening.

By Mr. Angevine: Defendant objects to the answer as not responsive to the question; sustained.

Q. If they were yarded in what is known as the shipping division?

By Mr. Angevine: Objected to by the defendant; the witness says he don't know.

By the Court: Overruled; defendant duly excepting.

A. We loaded out, I think it was two trains, if I remember correctly; I think 35 cars Saturday evening.

Q. What time did they go out? A. I don't know exactly, I think between five and six o'clock.

Q. Where were they destined?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Did they clear the flood?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. What road did they go on? A. Burlington.

Q. Which direction? A. East.

Q. When were they loaded? A. Saturday evening.

Q. What time were they loaded? A. Possibly, I think they left the yard between five and six o'clock.

Q. What time were they loaded? A. About that time; pulled them out as soon as they were loaded.

This evidence was elicited by the plaintiffs for the purpose of showing that the cattle of the plaintiffs in controversy in this case could have been shipped out by defendant Saturday, May 30th, 1903, as bearing upon the question of negligence specified in the said fifth paragraph of the plaintiffs' petition recited above. In this connection we invite the attention of the court in its perusal of the evidence in this case to repeated rulings of the trial court sustaining objections to the admission of evidence offered by plaintiffs. The learned trial court did not seem to look with favor on plaintiffs' case throughout. (The court's remark at page 172, Record, is a sample.) However, under the rulings cited hereafter in our brief, we ask that the court in considering the evidence in this case will consider that which was rejected by the trial court as well as that which was admitted. As bearing upon the proposition that the defendant, after the arrival of the flood at Kansas City, could still have saved plaintiffs' cattle from loss by driving them out of the stock yards, and that defendant was negligent in that respect, we refer to the testimony of W. C. Sparks, page 345, Record. The witness Sparks was a member of the firm of Sparks Brothers, engaged in the mule business at Kansas City, and the yard where that firm kept their mules was at Seventeenth and Genessee streets, and within a block of the shipping division of the stock yards where the plaintiffs' cattle were contained in the Kansas City Stock Yards after they were deposited therein. The evidence shows that plaintiffs' cattle arrived in Kansas City on the morning of Saturday, May 30th, 1903, and were at

once unloaded into the Kansas City Stock Yards, and the testimony of Mr. Sparks shows that between six and seven hundred head of mules in the said yards and barns of Sparks Brothers, within a block of where plaintiffs' cattle were lodged in the stockyards, were driven out of the said yards and barns of Sparks Brothers on Sunday Morning, May 31st, between 8 and 11 o'clock on that day, and said six or seven hundred head of mules were driven out of the yards six miles south of Kansas City in the country. This testimony proves that if the defendant company had exercised ordinary care it could have driven the plaintiffs' cattle out of the stock yards up out of the Kaw valley on the uplands, where said mules were driven by said firm of Sparks Brothers.

Another witness for the plaintiffs was L. A. Allen (Record, 226). On page 238 of the record Mr. Allen testified as follows:

Q. Got them out to a place of safety? A. They could all have been driven out or taken out or shipped out in a few hours, all day Saturday.

Mr. Allen was and is a member of a live stock commission firm at Kansas City, Missouri, and was present during the flood of May, 1903. Mr. Allen was recalled as a witness (Record, 622) and testified as follows:

Q. State whether or not there was any available way to get these cattle out of the yard on Saturday night and Sunday? A. Yes, sir.

Q. Now state how and in what way that could have been done, what means were available for the purpose? A. They could have been driven out in the country any time during that time.

Q. How long would it have taken to have gotten them from the shipping pens where they were to the highlands? A. 20 or 30 minutes.

Referring to what available means there were to move the cattle out the following testimony was given:

Q. What were they? A. Men and horses.

Q. How many? A. About the yards about 300

horses and three or four hundred men there all of the time; some commission men, some salesmen, some cattle drovers, speculators and traders.

Q. Did they have horses and men which were available for moving cattle? A. There were two stables there which hired horses.

Q. About how many men and horses would have been reasonably sufficient to drive those cattle and handle them through the streets and out to the highlands? A. Eight or ten men.

Q. Could they have handled the cattle so as to prevent their scattering and going all over the city? A. Yes, sir.

As to the extent of the loss and damage and injury to the plaintiffs' cattle by being driven upon the viaducts, the evidence fully sustains the averments in the petition. The cattle were driven up on the viaducts on Sunday, May 31st, and in consequence of the inability of anybody to give them water and feed, the plaintiffs sustained the injuries by the death and injury to the residue as specified in the petition. The 2,200 head mentioned in the petition as having been mixed along with the plaintiffs cattle as they were driven up on the viaducts, were the cattle of the Minnesota & Dakota Cattle Company, which are the subject of controversy in the companion case to this between said Minnesota & Dakota Cattle Company and this defendant. The circumstances attending the driving of these cattle up into the viaducts may be found from the testimony of W. H. Frost (Record, 37, 123, 298), Albert Newton (Record, 130), L. A. Allen (Record, 226), and Charles Stube (Record, 384). The uncontradicted evidence in the case shows that defendant, after depositing said cattle of plaintiffs, without the consent of plaintiffs in the Kansas City Stock Yards, on Saturday morning, May 30th, gave them no further attention or care. The defendant seems to have adopted the theory that the defendant company, when it

delivered the cattle to the Kansas City Stock Yards, owed no further duty to plaintiffs respecting said cattle or respecting their care in any way. The evidence of H. P. Child (Record, 529), and J. W. S. Hutchins (Record, 542), was introduced by the defendant for the purpose of showing that where a shipment of cattle is made to pass through Kansas City and the cattle thus shipped are delivered by the railway company bringing them to the Kansas City Stock Yards, where another company is to take the cattle from Kansas City, the delivering company is under no further obligations after delivering the cattle to the Kansas City Stock Yards. The contention of the plaintiffs in the trial below and here, was and is, that that evidence is not applicable to this case, for the reason that it was not within the contemplation of the parties to this suit that the cattle in controversy were to be shipped to Kansas City, or that they were under any circumstances to be delivered to the Kansas City Stock Yards. The evidence shows that the defendant did not intend to give, and did not give, as already stated, any attention to plaintiffs' cattle after they were deposited in the Kansas City Stock Yards.

Mr. G. A. Roberts (Record, 522-523) who was the local live stock agent of the defendant company at Kansas City, on cross-examination by plaintiffs' counsel, testified as follows:

Q. Why didn't you people get that train out of here? A. I don't know.

Q. You knew about the other three trains coming in Friday morning about 6:30, didn't you? A. No, sir.

Q. Saturday morning I mean? A. I suppose I knew it in a general way; yes, sir.

Q. Why didn't you get them out? A. I might say we did not get them out because it was not our business to get them out; we had hauled them in and it was up to the connecting line to get them out.

As we have seen there was no connecting line in this case, whose business it was, in the way the shipment was made, to receive the cattle from the defendant company at Kansas City; the routing of the cattle did not contemplate that they were to be brought to Kansas City by the defendant company or hauled from Kansas City by defendant or any other company, much less was there any evidence to show that it was the design of the parties in the routing that the connecting company in the transit were to take the cattle from the defendant company at Kansas City.

The reason, therefore, given by the witness, Roberts, that the defendant company gave the cattle no further attention after they were deposited in the stock yards, because the defendant company had hauled them in and "it was up to the connecting line to get them out," is wholly insufficient as a reason in this case, for the reason that there was no connecting line, and that the defendant's duty could not, and did not, end until it delivered the cattle safely to the connecting carrier at Atchison, Kansas. A delivery at Atchison, Kansas, is the only delivery by the defendant that satisfied the contract in this case. As a matter of fact, however, the defendant recognized itself as still in possession of the cattle from and after the flood. This is shown by the way bills read in evidence (Record, 121). A reference to the way bill there which accompanied these cattle from Hereford, Texas, to Evarts, South Dakota, shows the following endorsement on the bill of lading: "Reloaded July 10th, 1903, Lang, Kansas." This endorsement on the way bill was made under the following circumstances: The defendant company, after the flood had subsided and the cattle in controversy had been taken down again into the stock yards, reloaded the plaintiffs' cattle and took them out to its pastures near Lang, Kan-

sas, the next station to Emporia, Kansas, and on July 10th the cattle having been revived sufficiently by their pasturage there to be reshipped, were reloaded by the defendant and hauled from Emporia and Lang, Kansas, by way of Topeka to Atchison, and there delivered to the Burlington as the connecting carrier, and taken on through to Evarts, South Dakota. The use of this original way bill made at Hereford, Texas, to accompany the shipment through by the defendant company in reloading and taking the cattle after the flood, shows that the defendant regarded its duty as to carrying the cattle through as still existing after the flood, notwithstanding the previous delivery by the defendant company of the cattle to the Kansas City Stock Yards company, which latter company held the cattle as defendant's bailee. As further bearing on this point, the evidence shows that the defendant company paid the charges of the Kansas City Stock Yards company when the defendant received the cattle back from that company and when the cattle were shipped from Lang, Kansas, as already stated, by the defendant company, to go through to their destination at Evarts, South Dakota, the defendant company exacted from the plaintiffs, and the plaintiffs gave the defendant a bond (Record, 127-128). This bond is a distinct recognition by the defendant company that the defendant company had possession of plaintiffs' cattle before, during and after the flood, and the purpose of that bond was to secure the defendant company in the charges paid by the defendant company for the cattle while in the Kansas City Stock Yards, and the charges of defendant company for pasturage at Emporia and Lang, Kansas, if, in the course of the litigation, which it was understood would follow, the plaintiffs should be held liable for those charges. And as further bearing on this point, we call attention to the deposition (Record, 422) of

Gardiner Lathrop, who was then the general attorney of the defendant for Missouri, and is now the honored general solicitor of the defendant company for all of its lines. After the flood at Kansas City, and after the cattle of the plaintiffs were taken down from the viaducts into the stock yards, there were interviews between Mr. Combs, the general live stock agent of the defendant, and Mr. Lathrop, its attorney, and the attorneys of the plaintiffs in this case, and of the Minnesota & Dakota Cattle Company in the other case. At one of these interviews, Mr. Lathrop, speaking for the defendant company, desired plaintiffs in these actions to take the cattle off of the hands of the defendant company, so as to relieve the defendant from the duty and burden of the further shipment of the cattle to their point of destination in South Dakota. On this point Mr. Lathrop (Record, 423) testified as follows: "I remember this that we had wanted that the plaintiffs in this case should take the cattle off of our hands and take charge of them and ship them to destination and take care of them until ready to ship, and that offer was declined."

As further supporting the proposition of fact that the defendant gave no attention to the plaintiffs' cattle after the deposit of the cattle by defendant in the Kansas City Stock Yards, we refer to the evidence of Mr. A. W. Combs (Record, 580). Mr. Combs was the assistant general live stock agent of the defendant company at Kansas City, and testified as a witness for the defendant in this case. Mr. Combs testified as follows:

"Q. It has been suggested in evidence or in questions of counsel that you might have removed those cattle from the stock yards here, why didn't you do it? A. Why, it never entered into the heads of anybody in the stock yards I don't think, to move any stock out of the stock yards; we never thought of such a thing, and there never was any such a suggestion made by anybody,

and did not deem it necessary; I talked with the stock yards foreman, Mr. Hutchings, Saturday evening. * * *

Q. Was there any other reason why you did not attempt to move the cattle in question? A. We supposed that we had the cattle delivered to the Stock Yards company and other carriers, connecting carriers.

Q. You may state whether or not, from your experience there and the custom of the yards, you considered what had been done as a delivery of the cattle? A. Yes, sir; we did everything that is customary to do in delivering cattle to the connecting carrier; it was done in the same usual manner that it is the custom always to do; we delivered those cattle to the Stock Yards company for the connecting carrier, and those which were to go through without feeding we delivered to the Missouri Pacific."

As we have already seen, the defendant in this case was not excused from looking after the cattle and removing them from the stock yards after the cattle were deposited by defendant in the stock yards on the ground of a connecting carrier, because there was no connecting carrier in this case to receive the cattle from the defendant company in Kansas City, and for the further reason that the defendant, during and ever since the flood, has recognized as we have seen, in various ways, the defendant company as always being in possession of plaintiffs' cattle until they were delivered by the defendant to the connecting carrier at Atchison, and finally shipped out to their destination at Evarts, South Dakota, inclusive of the time the cattle were in the stock yards. The contention of the defendant below was, and is here, that it did not owe any duty to plaintiffs' cattle after they were delivered into the stock yards. It is not denied by the defendant, if it owed the duty to plaintiffs to care for plaintiffs' cattle after they were delivered into the stock yards, the same as if defendant had never delivered them to the said stock yards, that defendant did not perform that

duty; in short, it is not denied by defendant that it did not care for plaintiffs' cattle after they were delivered into the stock yards, if defendant owed said cattle any duty while they were therein. The issue tendered by defendant on this branch of the case is, that having delivered the cattle into the stock yards, the defendant no longer owed any duty in respect thereto. The defendant does not deny that it did not perform its duty, if it owed a duty. As we have seen, the cattle as a matter of fact, as between plaintiffs and defendant, were still in defendant's possession, notwithstanding the delivery of the cattle into the stock yards, because their delivery by defendant in the stock yards was without plaintiffs' consent, and because there was no connecting carrier at Kansas City in the case, and because all the uncontradicted evidence in the case shows that the defendant treated itself as being in possession of said cattle while in the stock yards and during and after the flood and until their delivery to the connecting carrier at Atchison in their final transit after the flood.

What was true as we have seen of Roberts and Combs, with respect to their neglect of plaintiffs' cattle, after they were deposited in the stock yards, is also true of the witness, Sharp (Record, 593), who, as we have seen, was the general superintendent of defendant of terminals at Kansas City, and also of General Superintendent Hurley. As the foregoing statement shows, Messrs. Sharp and Hurley, although giving close attention on Saturday, May 30th, to the removal of freight cars and dead freight therein, and to the removal thereof from Argentine to Kansas City, gave no attention whatever to plaintiffs' cattle after they were deposited that Saturday morning in stock yards. The telegrams in evidence show that Mr. Hurley had been giving the closest attention to plaintiffs' cattle up to that Saturday, but the

evidence of Mr. Sharp and the other evidence shows that neither Mr. Sharp nor Mr. Hurley gave any attention to plaintiffs' cattle after they were shipped from Emporia to Kansas City. The cattle of plaintiffs in this action and the 2,200 head of cattle involved in the other case of the Minnesota & Dakota Cattle company, which were mixed together and taken up at the same time on the viaducts, were worth in the aggregate from seventy-five to one hundred thousand dollars, and yet the uncontradicted evidence and facts in the case show that neither Mr. Hurley nor Mr. Sharp gave the slightest attention to those cattle from the time they were deposited in the stock yards Saturday morning. There was considerable evidence at the trial offered and introduced by the defendant to show that the houses and stocks of goods, packing houses and other buildings and properties in the Kaw valley at Kansas City, were not removed before the climax of the flood. The testimony given for the defendant by the witness, William Fletcher (Record, 552), and H. S. Swingley (Record, 564), was introduced by the defendant on this point. Of course, it was not shown and could not be shown, that either the houses or stocks of goods at Kansas City in the valley of the Kaw, were placed at their locations therein after the rise of the flood of May, 1903. Those houses and stocks of goods had been at the places where they were submerged by the flood for months and years prior to that flood. It was not shown, and could not be shown, that the houses or stocks of goods could have been removed after the flood had reached the height it had reached when the cattle in controversy were brought to the Kaw valley and were deposited in the stock yards. In this connection we call attention to the fact that the defendant's evidence shows that there was practically no live stock in the Kaw valley at Kansas City, Saturday, May 30th, 1903, or there-

after, aside from the cattle involved in these two cases. The evidence shows that all of the cattle that were in the Kansas City Stock Yards at the time the cattle in these two cases were driven on to the viaducts, aside from these cattle, were about 300 head. The cattle which were driven up on the viaducts was the 800 head in this case, the 2,300 head in the case of the Minnesota & Dakota Cattle company, and about 300 head of other cattle, making 3,400 head altogether. Although the daily receipts in the Kansas City Stock Yards of cattle are well known to run up into the thousands and tens of thousands, there is no evidence to show that there were any other cattle in those stock yards at the time these cattle were driven up on the viaducts except the two bunches in these two cases and the said other 300 head. All of the cattle that were in the stock yards were driven up in the viaducts, and the evidence shows that all the cattle that were driven up on the viaducts were these two bunches in these cases and the other 300 head. So far as the evidence shows there was not a single head of cattle in the packing houses in Kansas City when the climax of the flood came. The Sparks Brothers, as we have seen, got out all of their mules, and everything that had legs with which to walk was gotten out of the Kaw valley, at Kansas City, except the cattle in these two cases and said other 300 head. A large amount of testimony introduced by the defendant and covering very many pages of this record, showing that the houses and stocks of goods in the Kaw valley at Kansas City were not removed, is mere lumber in the case, and has no tendency to show what was the defendant's duty respecting the live stock in this case, which, as we have seen, was worth from seventy-five to one hundred thousand dollars, and which the defendant, with its eyes wide open, brought to the very mouth of the Kaw river at the most dangerous point in the flood,

and on the eve of its greatest height, and at the very time of its climax.

The averments in the pleadings in this action of the giving of notices by the plaintiffs to defendant of the loss and damage, were amply proven by evidence (Record, 111 to 116), and all of the averments of the petition and reply of the plaintiffs were amply proven at the trial by uncontradicted evidence contained in the bill of exceptions.

We assume that the statement, brief and argument which will be filed by counsel for the Railway company in this court will be the same as the statement, brief and argument filed by them in the Court of Appeals, and inasmuch as reply briefs, as we understand, are not favored in this court, we have thought it proper at this point of our statement to answer some of the suggestions made by counsel in their brief for the defendant Railway company.

We realize that it is of the utmost importance in arriving at a just conclusion in these cases, that the court should be made aware of the facts of the particular cases. A perusal of defendant's brief would give rise to the supposition that the plaintiffs are here contending that a common carrier is liable at all events for loss or injury of goods in transportation. Much of defendant's brief is consumed in quoting authorities and making arguments to the effect that a common carrier cannot be held liable unless it fails in the discharge of some duty imposed upon it by its undertaking of shipment; that if it acts carefully and diligently in the discharge of its duties, it is not liable; that it cannot be expected, and will not be held, to anticipate dangers which a reasonably prudent person would not, under the circumstances, apprehend; that conditions appearing after a calamity which no human foresight could anticipate, cannot be

fairly chargeable to the knowledge of the carrier, but it can only be held to know, or anticipate, what, under all the circumstances, a reasonably prudent person, similarly situated, should know, or anticipate.

Plaintiffs, in the briefs of defendant, are sought to be placed in the position of denying these generalities. We do not. We wish the court to understand the exact facts of the cases, maintaining, as we do, the proposition that those facts prove the wrongful and unlawful deviation and the propositions of negligence heretofore specified.

In defendant's brief it is argued by counsel that because Mr. Frost, one of the plaintiffs in this case and who accompanied the cattle, asked the station agent at Strong City while the cattle were there, whether the cattle could not be run around the flooded district and shipped by way of Superior, Nebraska, over the Elkhorn route, therefore the plaintiffs are to be taken as giving their consent to the deviation of the cattle to Kansas City.

It seems from the testimony of Mr. Frost (74-75, Record), that in some conversation between Mr. Frost and the agent at Strong City, Mr. Frost suggested whether the cattle could not be taken to their destination by way of Superior, Nebraska. Defendant had a railway running from the next station west of Strong City, north, or northwesterly, to Superior, Nebraska. At the time of that suggestion, which occurred in a conversation incidentally, the Kaw valley had not been flooded so that it could not be crossed, either at Topeka or on its road going to Superior, Nebraska. The other train load of the cattle of these plaintiffs had gone across the Kaw valley at Topeka and was reaching its destination in South Dakota. That was the situation when Mr. Frost made that suggestion to the Strong City agent of the defendant. It is said that Mr. Frost was anxious to have the

cattle shipped to their destination. That is undoubtedly true, but the anxiety of Mr. Frost in that respect was no justification for any of the wrongful or negligent acts of the defendant. Even if Mr. Frost had been negotiating directly with an officer of defendant, empowered by it to act upon the subject of deviating the shipment, and it had been agreed by them that the cattle might be deviated to Superior, Nebraska, still that would not be a justification for the subsequent deviation at the very climax of the flood, to Kansas City, at the mouth of the Kaw river.

The station agent at Strong City had nothing to do with the control and movements of these trains, or either of them. The evidence of Mr. Hurley and the evidence of the telegrams in the record all demonstrate that Superintendent Hurley and the general officers of the defendant railway company at Topeka controlled the movements of the train. The suggestion of Mr. Frost that the cattle might be shipped by way of Superior, Nebraska, cannot be turned into consent by the plaintiffs to bring the cattle to Kansas City (75, Record). It appears, however, that at the time of the suggestion, the Superior, Nebraska, line from Strong City, of defendant, was also flooded, but this was unknown to Mr. Frost. Strong City, where this suggestion was made, was some distance south of the valley of the Kaw river, and neither Mr. Frost nor any of his employees with this train knew anything about the flood conditions in the Kaw valley, except as those conditions were revealed to him by the station agent at Strong City. The evidence of Mr. Frost abundantly shows that in the various movements of the train carrying the cattle in controversy, he was not at any time consulted. He was not consulted while the cattle were at Strong City, by defendant's agents or servants, as to the movements of the train.

Mr. Frost in his testimony says (39-40, Record):

"Q. State whether you were consulted at any of these times when the cattle were unloaded or reloaded and unloaded again? A. No, sir, I was not.

"Q. What time were they unloaded that time? A. They were unloaded about seven o'clock, six or seven o'clock, somewhere along there.

"Q. The same evening? A. The same evening.

"Q. Where were they put when they were unloaded that time? A. Put back into the yards.

"Q. State whether Mr. Cloyd was there with his train while you were there? A. No, sir, he was not.

"Q. Were you there while his train was loaded out? A. Yes, sir.

"Q. How long did the cattle remain in the pens there, your train, after they were unloaded the second time? A. They were reloaded again the second day, I forget what time.

"Q. Was it in the forenoon or afternoon? A. It was in the forenoon, I think.

"Q. Was the entire train loaded up? A. No, sir.

"Q. What portion of it? A. About that I don't know just how many; I think about half.

"Q. How long were they in loading up this half? A. Perhaps they consumed half an hour.

"Q. After they were loaded up, what was done with them then? A. They began to unload again, and I asked them what the trouble was, and they said——

"Q. What was the response? A. They said they had orders to unload.

"Q. Where were the cattle put when they were unloaded that time? A. Put back in the yards.

"Q. Who did that loading, or unloading, I should say? A. The crew which was there.

"Q. The same crew which had been engaged—— A. I suppose it was the same crew, I was not acquainted with any of them.

"Q. Were you consulted in that unloading and loading up again, by anybody? A. No, sir.

"Q. Was this man Newton under you there? A. Yes, sir.

"Q. Was he employed by you to accompany the train through? A. Yes, sir.

"Q. When were the cattle again loaded, if they were afterwards loaded out? A. They were then loaded on the morning of the 29th.

"Q. That would be Friday morning? A. That would be Friday morning.

"Q. What time in the morning were they loaded up that time? A. They commenced loading about half past seven, I should think; seven or eight o'clock.

"Q. What was done with the cattle at that time when they were loaded? A. They were loaded and run down on the sidetrack.

"Q. How long did they remain on the sidetrack? A. About three hours.

"Q. What was done with them then? A. They were pulled out.

"Q. What time Friday were they pulled out? A. About one or half past.

"Q. What was the next place you reached on the line? A. The next stopping place was Emporia.

"Q. What time did you get to Emporia? A. I don't know just exactly, it must have been three o'clock, somewhere about that time.

"Q. In the afternoon? A. In the afternoon.

"Q. You may state where you came to after leaving Emporia? A. The next place, the next stop was Kansas City.

"Q. When did you reach Kansas City? A. Kansas City the morning of the 30th, Saturday, about somewhere about seven o'clock, I should think.

"Q. Had you been consulted up to that time as to these cattle on the train by the crew or any officer of the company? A. No, sir.

"Q. When did you first know you were going to Kansas City? A. When we got to Kansas City; I will correct that; the first station, I think the other side, I remember the station was Argentine, going through there that I knew then where I was, but up to that time I had no knowledge where I was or which way we were going."

See also pages 78 and 79, Record.

This testimony is not contradicted. It shows that Mr. Frost was not consulted, either at Strong City or while the train was moving from Strong City, and was being deviated from Emporia to Kansas City. Mr. Frost did not know of the deviation to Kansas City until about the time of the arrival of the train at Argentine, which is a suburb of Kansas City. (Record, 41-78-79.)

On these points Mr. Frost is fully corroborated by Mr. Newton, who accompanied him on this train with the cattle. (133-134-137, Record.)

The talk at Strong City between Mr. Frost and the company's agent arose incidentally between them. It was mere loose talk, the station agent having no authority in the premises. On the point of that suggestion, Mr. Frost testifies further:

"Q. What did the agent say? A. I asked him if he could not send us by way of Superior, and then over the Elkhorn, Missouri Valley or Northwestern to Council Bluffs.

"Q. What did he say? A. He says we can't do it, because you are routed by Atchison." (Record, 95.)

This answer of the agent is one of the many conclusive evidences in the case that the cattle were routed to go by way of Atchison.

On cross-examination of Mr. Frost, defendant's counsel attempted to prove that nobody but defendant's general officers at Topeka could order the deviation of the shipment, and that consequently the company's agent at Strong City had no authority to negotiate or contract on the subject with Mr. Frost. (80, Record.)

A shipment of Mr. Frost the year before had been sent by way of Superior, Nebraska; but in the second question at the top of page 80 of the Record, the words

"night before" instead of "year before," as the words should be, are inserted.

On cross-examination Mr. Frost explicitly testified that he had no communication with any of defendant's general officers who ordered and participated in the movement of these trains. (Record, 95.) In his testimony at that point, the examiner went over, one by one, the names of the different general officers of the defendant company, who appeared from the telegrams read in evidence to have ordered the movements of these trains; and Mr. Frost shows the he never saw any of these gentlemen or had any conversation or correspondence with them in any way in regard to the movements of these trains.

Superintendent Hurley, who ordered all the movements of these trains and who was a witness in the case, testified explicitly that he did not know, and had never met, either Mr. Frost or Mr. Mullin, of the Minnesota company, and that the orders moving and deviating the trains of the above company were made without consulting them, or any other person representing plaintiffs, and were each and all on his own motion. (Record, 195.)

On this point Mr. Hurley's testimony is as follows:

"Q. Do you know Mr. Frost? A. I do not.

"Q. Never met him? A. No, sir.

"Q. Do you know Mr. Mullin, president of the Minnesota & Dakota Cattle company? A. I do not.

"Q. You had no communication with him in making these orders and sending these telegrams, did you? A. No, sir, I did not.

"Q. Or with anybody representing the plaintiffs in either of these cases? A. No, sir.

"Q. These orders you made on your own motion, didn't you? A. Yes, sir, that is right.

"Q. All of which was done by you or any of your subordinates, in respect to the movement of these trains or done of your own motion? A. That is right."

The only time plaintiffs were consulted or gave any consent respecting the movements of these trains was when defendant, after the flood, removed the cattle from the Kansas City Stock Yards to defendant's pastures at Emporia, and those consents were in writing and fully preserved plaintiffs rights. (Record, 112-325.)

The trial court, in its able and exhaustive opinion, although considering every possible defense, paid no attention to the idea of consent to the deviation, and the record must be taken as showing a case of deviation without the plaintiffs being consulted and without their consent.

The contract route by way of Atchison and Topeka is shown by the testimony of Superintendent Hurely to have been the usual and customary route. (174-175-176, Record.) The uncontradicted claim of plaintiffs is that the defendant deviated these shipments of its own motion, as Superintendent Hurely testified, and without the consent of the shippers, and it follows, therefore, that when defendant ordered them off the main line at Emporia, it abandoned the shipping contracts, and with them whatever protecting provisions those contracts contained. It was argued in defendant's brief that the detention of the cattle at Strong City was justified, because the railway company received information from the Burlington, which was to take the cattle from the defendant company at Atchison, that its tracks were flooded between Atchison and Council Bluffs, between which last points the Burlington was to take the cattle, according to the original routing. Defendant claims in the brief of its counsel, that this information from the Burlington justified the detention of the cattle at Strong City; but even if this claim were, for the sake of the argument, allowed, still that claim does not support the claim that the railway company had a right, on its own motion, to deviate the cattle to Kansas City.

In the first place, defendant had and has no railway running from Kansas City to Atchison. Again, Atchison is on the Missouri river between Council Bluffs and Kansas City; and if the Burlington line was flooded from Atchison to Council Bluffs, what right did the defendant company have to suppose that it could get to Council Bluffs by way of Kansas City, instead of by Atchison? Two railways run between Kansas City and Council Bluffs and Omaha. Council Bluffs is on the east side and Omaha on the west side of the Missouri river. The Burlington runs from Kansas City by Atchison to Council Bluffs on the east side of the Missouri river and up the Missouri river valley, while the Missouri Pacific runs on the west side of the Missouri river. The Missouri Pacific railway runs up the same Missouri valley from Kansas City to Atchison. If the defendant could not get to Council Bluffs over the Burlington from Atchison, how, might it be asked, could it get to Council Bluffs over either the Missouri Pacific or the Burlington from Kansas City? This consideration must be taken in connection with the fact that all of the lines of the defendant railway company in Kansas, from Emporia north to Atchison, from Strong City to Superior, from Topeka to Kansas City, and over the cut-off from Emporia to Ottawa, were all flooded when the deviation occurred Friday, May 29th.

And since the lines up the Missouri valley were flooded, what possible excuse can be given for bringing the cattle away from Strong City, where they were perfectly safe and were being well taken care of?

In the brief of defendant, counsel says, in speaking of Sparks' mules, that were moved out of the Kansas City bottoms Sunday morning: "A few mules were taken out of the bottoms on Sunday." The testimony of Mr. Sparks shows that the number of those mules that

were taken out was between 600 and 700, and that they were all taken out between eight and eleven o'clock that morning. (Record, 345-346.) They were in the block adjoining the pens which contained these cattle.

Defendant's counsel seriously argued that, because the cattle involved in these cases were Texas cattle, therefore, they could not have been driven with the same facility that mules were driven, and counsel says that those cattle would have to be driven through the streets of Kansas City.

Anybody who is at all familiar with the Kansas City Stock Yards knows that it is in the West Bottoms of Kansas City, and that the cattle in controversy could have been driven from those stock yards out to the pastures south of the city without going through any of the streets of either the business or residence portion of Kansas City. The Kansas City Stock Yards are practically contiguous to the country districts surrounding Kansas City.

There were other facts shown in the evidence in this case, but we will refer to them in our brief and argument. All of the facts stated in plaintiffs' petition are practically undisputed, and are recapitulated as proven, in the opinion of the learned trial judge.

SPECIFICATION OF ERRORS.

1. The trial court erred in refusing to give at the conclusion of all of the testimony the instruction and charge tendered and requested on behalf of plaintiffs, that under all of the evidence the jury should find that the defendant was liable, and to find for plaintiffs (Record, 637).

The court should have given this instruction on the ground of the wrongful deviation of the cattle without plaintiffs' consent, and for the reason that such deviation as a matter of law, made the defendant liable for the consequence which ensued therefrom.

2. The court erred after the refusal of said peremptory instruction, in refusing to give and charge the jury, at plaintiffs' request, instructions numbered from 1 to 13, inclusive (Record, 638-644). These instructions asked by the plaintiffs and refused by the trial court presented the issue of this case to the jury upon the question of negligence, and the court erred by their refusal. The court should have submitted the case on that issue to the jury either on those or on other instructions.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing the jury to render a verdict for the defendant and against the plaintiffs. (P. 644.)

4. The court erred in its opinion shown in the record, in saying:

> "It, therefore, follows on the main case, the re-
> "quest for instructions to the jury to render a ver-

"dict for the defendant must be sustained and the "like request of the plaintiff must be denied; this "will be done." (P. 655.)

5. The opinion of the Circuit Court of Appeals holding that plaintiffs waived and lost the right to have the negligence issues submitted to the jury, or considered by the Court of Appeals, because plaintiffs prayed for a peremptory instruction, although they at the same time submitted thirteen instructions to the jury, is erroneous. See appendix.

POINTS AND AUTHORITIES.

I.

In this case, as the record shows, there were some exceptions by the plaintiffs to the rulings of the trial court in the exclusion of evidence offered by them and objected to by the defendant. We do not desire at this point in the brief to discuss those rulings. The trial court having ruled that upon all the evidence the plaintiffs had no case, we submit at this time that the evidence which was excluded should be considered by this court with the evidence which was received. The plaintiffs in these cases are entitled to have all of the evidence in the record considered, the evidence offered by plaintiffs and excluded by the court, as well as the evidence that was received. *Ry. Co.* v. *Harris*, 12 C. C. A., 598, l. c. 602. In that case it was adjudged that the rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects the evidence on the objection of the defendant, the defendant will not aftrwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence.

II.

The consideration of this cause involves in general two questions: (1) Whether the railway company is liable on account of the deviation of the shipment from Strong City to Kansas City; and (2) whether the railway company is liable on account of the several negligences charged and proven. The question of deviation raises a question of law pure and simple upon conceded facts. The question of negligences involves mixed ques-

tions of law and fact for determination by a jury under proper instructions from the court. To meet these two phases of the case, arising on the points of deviation and negligence, plaintiffs asked two sets of instructions, one a peremptory instruction asking the court to instruct the jury to return a verdict for the plaintiffs, based upon the proposition of deviation, and at the same time plaintiffs submitted to the court a series of instructions submitting the issues to the jury on the propositions of negligence. It is the undoubted rule that where each party in a trial by a jury ask, on the whole case, the court to give a peremptory instruction to the jury, they are both precluded thereby, and both parties in such cases stand in the same predicament as if they had asked the court to decide the case as a matter of law. A different rule, however, arises in this case, because the plaintiffs submitted, as they had the right to do, two sets of instructions at the same time, one asking the court to peremptorily rule the case in favor of plaintiffs on the proposition of deviation, and the other instructions asking the court in effect that if the peremptory instruction should be denied, to then submit the case to the jury on the propositions of negligence, for their determination. Of course, it will not be denied that plaintiffs had the right to insist upon the liability of the defendant on each of both propositions of deviation and negligence, and the plaintiffs, therefore, cannot be held to have waived its right by asking a peremptory instruction to a submission to the jury of the question of negligence, in the event that the court should deny that peremptory instruction. The decision of the Circuit Court of Appeals which was solely devoted to a denial of that proposition, should be reversed for the reasons set forth in our petition for the *certiorari* to this court, to which petition we refer and make a part of this statement and brief. See appendix.

III.

Unless the court felt required to give our peremptory instruction on the basis of deviation, it should have submitted the questions of negligence to the jury by proper instructions, such as we asked (page 638, Record), or other proper instructions. That the court should have submitted the question of negligence to the jury and that that question was a proper question for the jury is the settled law of the Federal appellate courts. *R. R. Co.* v. *Stout*, 17 Wallace, 657, l. c. 663. In that case this court, in its opinion, used the following language: "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there

was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a mater of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In the case of *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S., 262, l. c., 275, decided as late as 1893, this Court, in its opinion, said: "The principles announced in *R. R. Co.* v. *Stout* have been approved in many adjudged cases." And at page 279, in the same opinion, this Court says: "We adhere to the principles announced in *R. R. Co.* v. *Stout, supra.*" See also *Marande* v. *R. R. Co.*, 184 U. S.,173, which is precisely in point and the latest utterance of this Court. In these cases, as appears

from the written opinion of the learned trial court, there were four specifications of negligence relied upon by the plaintiffs in their petition:

(1) That the railway company was negligent in the detention of plaintiffs' cattle at Wellington and Strong City, Kansas, and that the company could have carried said cattle to Atchison, Kansas, by way of Topeka and delivered the same to a connecting carrier at that point.

(2) That defendant company was negligent after thus detaining the cattle at Wellington and Strong City, in not further detaining and holding them in those places until the flood, which had been on in the Kaw river, had subsided.

(3) That the company was negligent in diverging and deviating the shipments to Kansas City, and in taking the cattle into the lowlands at the mouth of the river in front of the approaching flood. And

(4) That the company was negligent in failing to move or cause to be moved the cattle from their position of peril in the stock yards at Kansas City before the arrival of the climax of the flood.

All of these acts of negligence were continuous and connected, constituting one uninterrupted and continuous negligence, and all arising after the inception of the flood and not anterior to it.

In cases of negligence, where the negligence consists of the failure to perform some positive duty created by law, the question of negligence is a question of law where the facts are undisputed, but in cases like this, where the negligences are violations of duties to be ascertained and found as facts by the jury under instructions of the court, it cannot be said that the question of negligence to perform the duty so found is ever a question of law.

In this case the question of negligence on the part of the defendant company with respect to all of the assignments of negligence, was a question to be determined as a mixed question of law and fact by the jury. It was the duty and province of the jury to determine what the duty of the defendant company was with respect to each and all of the four assignments named, and having determined the duty under the instructions and guidance of the court, then it was the province of the jury to determine whether the company was guilty of negligence in the discharge of the duty so found. See Vol. 8, Rose's Notes on U. S. Rep., where the cases following and citing the case of *R. R. Co.* v. *Stout, supra,* are collected.

If it was the duty of the court in this case to pronounce judgment on the issue of negligence, on the ground that the facts on that issue were undisputed, then that judgment should have been for plaintiffs and not for defendant.

IV.

The question of proximate cause was also a question for the jury, and not for the court, and the court erred in not submitting the question of proximate cause to the jury. This was the distinct proposition ruled in the case of *Milwoukee & St. Paul Ry. Co.* v. *Kellogg,* 94 U. S., 469. In that case it was adjudged by this court that "the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanynig circumstances." In the opinion in that case the Court said: "The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of *Ryan* v. *The New York*

Central Railroad Co., 35 N. Y., 210, and *Kerr* v. *Pennsylvania Railroad Co.*, 62 Penn. St., 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. *Webb* v. *The Rome, Watertown & Ogdensburg Railroad Co.*, 49 N. Y., 420, and *Pennsylvania Railroad Co.* v. *Hope*, 80 Penn. St., 373. And certainly they are in conflict with numerous other decided cases. *Kellogg* v. *The Chicago & Northwestern Railroad Co.*, 26 Wis., 224; *Perley* v. *The Eastern Railroad Co.*, 98 Mass., 414; *Higgins* v. *Dewey*, 107 Id., 404; *Tent* v. *The Toledo, Peoria & Warsaw Railroad Co.*, 49 Ill., 349. The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place." We are not aware that that explicit ruling by this court has ever been reversed or modified, and it would not be helpful to cite other cases affirming the same proposition. The cases following and reaffirming the above proposition in the Kellogg case, that the question of proximate cause is one

for the jury, may be found collected in Vol. 9 of Rose's Notes on the U. S. Rep., p. 125.

V.

The errors of the trial court in this case, we think, will be abundantly manifest from the opinion of the trial court itself. That opinion is reported in full in Vol. 135, Fed. Rep., 135, and also is reported in the printed record in this case (page 645, Record). We will quote herein from the opinion by the pages thereof as it appears in the Federal Reporter. At the bottom of page 140, the learned trial judge says: "It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury." We submit that this statement of the law is erroneous. The trial judge decided that, even though the negligence of the defendant contributed to the injury, still the defendant was not liable. This, we submit, is not the law. We do not believe that any authority can be found anywhere which affirms non-liability where the negligence of the defendant contributed with the act of God to produce the injury. Even the case of *R. R. Co.* v. *Reeves,* 10 Wallace, 176, which is relied upon as the leading case on the other side, distinctly and throughout recognizes liability on the part of the carrier if its negligence contribute, with the act of God, to produce the injury, and we do not believe any decision can be found anywhere, save and except alone the decision of the trial pudge in this case, which affirms non-liability where the company's negligence contributed to produce the damage and injury.

Again, at page 143, the trial court, in its opinion in this case, used the following language: "It may be con-

ceded that the cattle need not have been brought into Kansas City in the first instance, or, being in, that they could have been removed in the cars in which they arrived, or in others or on foot. Guided by events that followed as now seen by us today, the cattle no doubt should and unquestionably would have been removed from their place of peril." The duty of the defendant company was no different after the flood was over than it was before. If, as the learned judge says, the cattle "could have been removed in the cars in which they arrived, or in others or on foot," then it was a question for the jury to say whether, as was done by other owners of live stock, it was the duty of the defendant company to have removed the cattle in the cars in which they arrived, or in others, or on foot, and whether the company was guilty of neglect of that duty. The court says that the defendant company could have removed the cattle, either in the cars or in others or on foot, and then the court says that, as matters seem to us now, "the cattle undoubtedly should and unquestionably would have been removed from their place of peril." As the flood had been on for a week in advance of the bringing of the cattle to Kansas City, what reason was there for the court saying, as a matter of law, that the duty of the company was any different during that entire week than what that duty seems now to have been? If the flood at Kansas City on that fatal Sunday had come suddenly and without warning, like a thief in the night, or a cyclone in a breath, there might be some reason for distinguishing between what the duty of the company as it seems now and what it was before the coming of that cyclone, and if the cattle "undoubtedly should and unquestionably would have been removed from their place of peril," how can the court say, as a matter of law, that the company was not negligent, and that that negligence

did not contribute to produce the injury? Then the court follows the above language by the following: "That these circumstances and acts of the defendant company furnished an occasion for the loss is unquestionable, but that the direct and proximate cause of the loss and damage was the unprecedented and unexpected flood and attendant destruction that came wholly without anticipation on the part of the defendant company." These last quoted remarks are subject, as it seems to us, to several criticisms. In the first place, the flood was not unexpected. The flood had been on over a week. The rains causing the flood had been falling a month. The flood in the Kaw valley was on when the cattle arrived at Strong City. The cattle were delayed two days and over at Strong City, in consequence of the flood. The deviation which took place at Strong City and Emporia was in consequence of the flood. All of the acts of negligence charged against the defendant company took place after the flood was on. The defendant lines, from Emporia to Topeka and from there to Atchison and from Topeka to Kansas City were all flooded before the deviation, and defendant came to Kansas City with these cattle over another road. In view of all these facts, the remark of the court that the flood was "unexpected" is rather remarkable. If, after the plaintiffs' cattle had been put in the stock yards, they had been injured and damaged by a cyclone or fire, there would be some reason for saying that such cyclone or fire, being wholly unexpected, was the proximate cause of the injury. But it is not correct in this case to say that the flood was at any time unexpected after the arrival of the cattle at Strong City. Nor was it correct for the learned trial judge to say in his opinion that the flood was without anticipation at the time it reached its climax on Sunday, for the reason that on Saturday, the day before, under

the direction of the general superintendent of the company, the defendant moved 1,300 of 1,400 cars from its yards in Argentine to the highest place where the cars could be placed at Kansas City. There were 1,400 cars altogether, and the very best that the company could do with those cars was done. They could not have been taken out of the Kaw valley at Kansas City, but they were placed upon the highest ground possible in Kansas City. But while those cars were left, as they were forced to be left, in the bottoms at Kansas City, the company not having sufficient means to take them away or out of the bottom, still, the plaintiffs' cattle could have been taken out by being driven out as other people drove out their live stock. And in view of this action of the defendant company with respect to said 1,400 cars on Saturday, it will not do to say in this case that the flood which had been on for a week was, on Sunday following that Saturday, "without anticipation on the part of the defendant company." It may not have anticipated that the flood would reach the heights it reached, but for more than two days before it reached its climax on Sunday, it knew full well that a flood so large and dangerous as to flood all its Kansas lines of railway over which these cattle could be shipped, was on, and that that flood was rising higher hourly from the increasing and unprecedented rains which had continued with slight intervals nearly a month. The learned trial judge in his opinion, at pages 138 and 139, summarizes the fact in words as follows: "It appears from the evidence that "during the greater part of May, 1903, unusual and "unprecedented rains fell in the watershed of the Kansas "river, which empties into the Missouri river at Kansas "City. To such an extent was this true that a vast "amount of property located in the valley was inundated "and destroyed by high water in the Kaw river following

"in consequence of such rain. The railways running "along and across this valley were overflowed and the "property destroyed. * * * At the time the cattle "were carried to Kansas City by the defendant company, "its lines of road from Topeka to Atchison and from "Topeka to Kansas City were submerged by the flood, "and could not be operated." In addition to the fact thus stated by the trial judge the evidence showed that Friday night, which was before the arrival of the cattle at Kansas City, a sudden rise, something like a tidal wave, reached Topeka in its onward flow down the valley of the Kaw river.

In view of these conceded facts, the conclusion of the learned trial judge that the flood was unexpected as expressed in his words cited above: "That these circum- "stances and acts of the defendant company furnished "an occasion for the loss is unquestionable, but that the "direct and proximate cause of the loss and damage was "the unprecedented and *unexpected* flood and attendant "destruction that came wholly *without anticipation* on "the part of the defendant company," is absolutely without support or foundation.

In support of the proposition that contributory negligence of the carrier renders it liable, notwithstanding the act of God relied on by it as the cause, see the following authorities from which citations are made in our argument following these points, viz.:

Sweezey v. *Philadelphia*, 64 Pa. St., 106; *Helbling* v. *Cemetery Co.*, 201 Pa. St., 171; *Morrison* v. *Davis*, 20 Pa. St., l. c., 176-177; *Williams* v. *Grant*, 1 Conn., 487; *Wallace* v. *Clayton*, 42 Ga., 443; *R. R. Co.* v. *White*, 88 Ga., 805; *Merritt* v. *Earle*, 29 N. Y., 115., l. c., 116f; *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570; *Bibb Broom Corn Co.* v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709; *R. R. Co.* v. *Curtiss*, 80

Ill., 324; *Wald* v. *R. R. Co.*, 162 Ill., 545; *Blodgett* v. *Abbott*, 72 Wis., 516; *Nelson* v. *Ry. Co.*, 72 Pac. Rep. (Mont. Sup. Ct.), p. 643, l. c., 651; *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697; *R. R. Co.* v. *David*, 6 Heisk, 261; *McGraw* v. *R. R. Co.*, 18 W.Va., 361; *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456; *Coosa Steamboat Co.* v. *Barclay*, 30 Ala., 12, l. c., 127; *Nugent* v. *Smith*, 1 C. P. Div., 19 and 423; Vol. 1, Am. & Eng. Enc. of Law (2nd Ed.), 595; Vol. 5, Am. & Eng. Enc. of Law (2nd Ed.), 234; Hutchinson on Carriers, Secs. 181, 187, 188; Vol. 6, Enc. of L. & P., 377-384; *Strauss* v. *Ry. Co.*, 17 Fed. Rep., 209, l. c., 212; *Caldwell* v. *Sou. Ex. Co.*, 4 Fed. Cas., No. 2303, p. 1036; *Thompkins* v. *Duchess of Ulster*, 24 Fed. Cas., No. 14087a, p. 32; *Southern Pac. Co.* v. *Schoer*, 52 C. C. A., 269, l. c., 274; *Newport News Co.* v. *U. S.*, 9 C. C. A., 579; *Clark* v. *Barnwell*, 12 How., 272, l. c., 280; *Holladay* v. *Kennard*, 12 Wall., 254; *Gleason* v. *R. R. Co.*, 140 U. S., 433; The Majestic, 166 U. S., 376, l. c., 386; *Gratiot W. H. Co.* v. *R. W. Co.*, St. Louis Ct. of App., April 30, 1907; 102 S. W., 11.

VI.

At page 142 the learned trial judge in his opinion upon the branch of the case relating to deviation, frankly admits as follows: "The route originally contemplated by the parties was to Atchison and thence by the Burlington," and the remark following shows clearly that the learned trial judge recognized the line of railway of the defendant from Strong City to Topeka and from there to Atchison as the line over which the cattle were routed. The learned trial judge on the same page, 142, on this branch of the case further says: "By this time it was impossible for the defendant to carry the cattle over its line to Atchison, or to carry them to Kansas City other-

wise than the way they were carried; that the contract of shipment and the circumstances, common business prudence and the law, as well, authorized a departure *from the originally intended route of shipment*, I have no doubt, unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered." This is all that is said by the learned trial judge on the subject of deviation. The above remarks, as it seems to us, are subject to several criticisms. In the first place according to all of the authorities, as will hereafter be shown in this brief, the defendant company was not authorized to deviate or take the cattle away from Strong City if they were in a safe place at Strong City. If, as the learned judge says, it was impossible for the defendant to carry the cattle over its line to Atchison, or even to Kansas City, otherwise than by another road, namely, the San Francisco Railroad, what reason was there for the defendant to suppose that it could get the cattle out by a roundabout transit through Kansas City, and thence up through the Missouri valley over practically the same route the cattle would have to go from Atchison northward? The flood was coming down the Kaw river. If the flood was so bad at Topeka that the cattle could not be crossed there, what reason was there for supposing that the cattle could be gotten across at Kansas City? The cattle were in a safe place at Strong City and should have been left there. By the deviation of the cattle from Strong City they were taken from a safe place into what was then known to be a hazardous place. If the cattle, as the defendant company well knew, could not be taken across the Kaw river at Topeka, then the Kaw river at Topeka was certainly a hazardous place, and if the Kaw river at Topeka was a hazardous place, most certainly the Kaw river at Kansas City would be a hazardous place by the

time the shipment arrived there. In all the cases of deviation where the court has sustained the deviation, it was because the cattle were in an unsafe place at the time of deviation. The cattle were in a safe place at Strong City. They were there in the feed lots of the defendant company, far removed from the Kaw valley. In all of the cases where deviations have been sustained, the line to which the deviation was made was not beset with any of the troubles which made the deviation necessary. In this case the line to which the cattle were deviated was a more dangerous line than the line of railway on which the cattle were originally routed. Again, on this subject of deviation, all the authorities agree that even when the deviation is made necessary the carrier should consult the owner of the cargo shipped. At page 137 the trial court, in its opinion, said: "The cattle were accompanied at all times by the owners of the stock or their representatives in charge, signing the contracts." The deviation in this case was absolutely wrongful for the reason that the company never consulted the owners or parties in charge of the stock. The deviation of the cattle to Kansas City was both wrongful and negligent. If it was negligent, which was a question for the jury, the company was liable on that ground. If the cattle were safe at Strong City, then it was unnecessary, and therefore wrongful, and if wrongful, the defendant is liable. If the deviation from Strong City to Kansas City was made without the consent of the shippers, then, according to all the authorities, it was wrongful and the company is liable on that ground alone. The learned judge, at page 142, in the language we have cited above, says that the deviation was justifiable "unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered." These words bear upon the question of negligence, but,

as we have seen, the deviation was wrongful, for there was no necessity for taking the cattle from Strong City, and because, of the conceded fact in the case, that they were taken without the consent of the shippers.

At the bottom of page 142 and top of page 143 of his opinion, the learned trial judge couples the bringing of the cattle to Kansas City and putting them in the Kansas City stock yards as one act. This is erroneous. When the cattle were deviated at Strong City and Emporia it was with the purpose on the part of defendant company to deliver them to the Missouri Pacific Railway Company at Kansas City, and that that company would carry the cattle from Kansas City to Omaha, up the same Missouri river valley up which the cattle were originally routed to go over the Burlington from Atchison to Council Bluffs. The defendant company did not intend to deposit and leave the cattle in the Kansas City stock yards until after their arrival in Kansas City. At the top of page 143 the learned trial judge speaks somewhat eloquently of the safety in ordinary times of the Kansas City stock yards. The defendant company was, from the arrival of the cattle at Strong City, not acting in ordinary times. One of three great floods of 1844, 1881 and 1903 was already on when the cattle reached and left Strong City. An ordinary safe warehouse in Chicago was not a proper place in which to deposit goods during the great Chicago fire, much less was it a proper place to which to deviate a shipment not destined to that city. (*Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 529.) The Kansas City stock yards on May 30th and 31st, 1903, was as unsafe a place in which to deposit these $100,000 worth of cattle as was a Chicago warehouse during the great fire in that city. This being so, it is immaterial whether the purpose to put the cattle in the Kansas City stock yards originated at Strong City and Emporia, or after

the arrival of the cattle at Kansas City. The learned trial judge, at the top of page 143, in speaking of the Kansas City stock yards, eloquently says, "that in all the "history of these yards they had not been overflowed or "endangered by overflow." One would think from this remark that those yards were a very ancient institution. The facts are that neither those yards or Kansas City itself were even dreamed of until sometime after the flood of 1844, and that those yards did not have anything more than an embryo existence until after the flood of 1881. The foregoing propositions, as to the effect of the admitted deviation in this case and the consequent liability of defendant, are abundantly sustained by the authorities: *Crosby* v. *Fitch*, 12 Conn., 410, l. c., 410, 420, 423; *R. R. Co.* v. *Beck*, 125 Pa. St., 620; *Phillips* v. *Bingham*, 26 Ga., 617; *R. R. Co.* v. *Cole*, 68 Ga., 623; *Cassilay* v. *Young*, 4 B. Mon., 265; *Sager* v. *R. R. Co.*, 31 Me., 228, l. c., 238; *R. R. Co.* v. *Washburn*, 22 O. St., 324; *Ex. Co.* v. *Smith*, 33 O. St., 511; *Brown Co.* v. *R. R. Co.*, 63 Minn., 546; *Hendricks* v. *Steamship Co.*, 18 La. Ann., 353; *Hastings* v. *Pepper*, 11 Pick., 41; *Proctor* v. *R. R. Co.*, 105 Mass., 512; *Ry. Co.* v. *Allison*, 59 Tex., 193; *Johnson* v. *Ry. Co.*, 33 N. Y., 610, l. c., 611; *Goodrich* v. *Thompson*, 44 N. Y., 324; *Maghee* v. *R. R. Co.*, 45 N. Y., 514; *Keeney* v. *Ry. Co.*, 47 N. Y., 525; *Robertson* v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313; *Seavey Co.* v. *Union Trans. Co.*, 106 Wis., 394; *Ry. Co.* v. *Brichetto*, 72 Miss., 891; *R. R. Co.* v. *Odil*, 96 Tenn., 61; *Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 520; Vol. 1, Am. & Eng. Enc. of Law (2d Ed.), 594; Vol. 5, Am. & Eng. Enc. of Law (2d Ed.), 422, 426; Hutchinson on Carriers, Secs. 190, 191; Lawson on Bailments, Sec. 127; Vol. 6, Cyc. of Law & Procedure, 383, 384; *Marsh* v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873; *Ins. Co.* v. *LeRoy*, 7 Cranch., 26; *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40;

Constable v. *Steamship Co.*, 154 U. S., 51, l. c., 61; *Texas & P. Ry. Co. et al.*, v. *Eastin* (Sup. Ct. of Texas, May 15, 1907), 102 S. W., 105, l. c., 106.

VII.

We submit that the opinion of the trial judge is not supported by the authorities cited therein.

In the case of *R. R. Co.* v. *Wentworth*, 27 S. W., 680, cited by the trial court in its written opinion in this case, it appears that the sheep which were being transported by the railway company from Texas to Chicago were overtaken while *en route* by a flood, which prevented the further transportation of the sheep on the line on which they were routed, and under those circumstances the railway company deviated the shipment of the sheep over another line on which there was no flood, which involved of necessity a delay, requiring, as it did, more time on the deviated line to get to Chicago than it required over the line on which they were routed. But in that case the sheep could not have been taken to Chicago by reason of the flood over the line over which they were routed, and since the action there was damage to the sheep by delay, the court held that there was no right of action since the sheep were gotten to Chicago in much less time than was necessary to take them by waiting until the flood subsided. There was no flood in that case along the line to which the sheep were deviated, and since the line on which they were routed was wholly obstructed by a flood the court held that the deviation was proper and necessary. The court, in passing on this point, says: "In this case the deviation from the usual or stipulated route was caused by unprecedented floods which rendered it absolutely necessary for the sheep to be carried over the Cotton Belt instead of the St. Louis,

Iron Mountain & Southern Railroad, to prevent their loss or at least a much greater delay than actually occurred."

It seems to us that Sec. 311, Hutchinson on Carriers, which is cited by the trial judge in his opinion in connection with the above Texas decision, is an authority against the learned trial judge rather than in favor of his conclusion.

In the case of *Snow* v. *Ry. Co.*, 9 N. E., 702, which in this connection is also cited by the learned trial judge in his opinion, the court held that where the contract was silent as to what line of road the initial carrier should deliver the shipment, that the carrier might select any customary and reasonably safe and direct road of railway to which the initial carrier should deliver the shipment at the terminus of its line, and that since the contract was in writing it was not competent for the parties to prove by parol evidence a prior verbal agreement specifying a certain route. However, we suggest that this decision does not bear upon the question of deviation. This decision with the two authorities above cited was cited by the trial judge in his opinion to sustain the proposition in this case that the defendant railway company was authorized and justified in its deviation of the plaintiffs' cattle from Strong City to Kansas City, but the above decision in the Snow case does not bear upon the question of deviation at all. That decision in the Snow case only bears upon the question of what would be the railway company's right in this case in the selection of a carrier at Atchison if it had carried the cattle by way of Topeka to Atchison. It does not throw any light upon the question of deviation from Strong City and Emporia to Kansas City.

Another decision cited by the learned trial judge in his opinion was *Ry. Co.* v. *Elliott*, 55 Fed. Rep., 949, 5

C. C. A., 347. An extract from the opinion of Judge Sanborn in that case is contained in the opinion of the trial judge in this case, but the facts in the Elliott case do not serve to throw any light upon the case at bar, as a brief reference thereto will show. In the Elliott case the plaintiff was in charge of certain stock shipped by rail and was riding in the caboose. Before reaching a certain station where he knew it was usual to change cabooses, he asked the conductor if a change would be made there and was answered in the negative and told that the train would only stop a few moments and he would have no time to examine his stock. On reaching the station, however, he got off, walked forward and examined several cars of the stock, and then turned back, but the train having already started he feared he would be unable to board the caboose and therefore climbed upon a stock car and walked backward along the top of the train. Before he reached the caboose the train had stopped and was backing for the purpose of changing the caboose, and it was kicked off from the train just as he was stepping upon it, causing him to fall to the track, where his foot was crushed by a wheel. And it was held that the statement of the conductor that the caboose would not be changed was not the proximate cause of the injury. The remarks of the court in its opinion in that case, while applicable and proper in disposing of that case on those facts, we submit throw no light upon this case and have no application to it.

The case of *Ry. Co.* v. *Kellogg*, 94 U. S., 469, is one of the authorities cited by the trial judge in his opinion. In that case there was a verdict and judgment in the trial court against the railway company, based upon the act of the railway company burning the saw mill of the plaintiff on the banks of the Mississippi river. The charge against the railway company was that the fire was

negligently communicated from the defendant railway's steamboat "Jenny Brown" to an elevator built of pine lumber owned by the defendant and standing on the bank of the river, and that the fire was communicated to the plaintiff's saw mill and lumber piles while an unusually strong wind was blowing from the elevator towards the mill and lumber. This court affirmed the verdict and judgment against the railway company. The court in its opinion in that case held that the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanying circumstances. It seems to us that the trial judge in this case not only did not follow the opinion of this court in that case, but plainly disregarded it. It has been the recognized rule of this court, ever since its decision in said Kellogg case, that it is for the jury to determine the question of proximate cause in this class of cases. This court in that case adjudged that the finding of the jury in that case that the burning of plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, which had been caused by their negligence, was in effect a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The opinion of the court in the Kellogg case proceeds throughout upon the idea that the question in this class of cases of proximate cause is one of fact for the jury, and we repeat that it is difficult to understand just how the learned trial judge in his opinion in this case felt justified in citing the opinion in the Kellogg case in support of his action directing a verdict for the defendant.

In the case of *Insurance C. v. Taweed*, 7 Wallace, 44, which is another authority cited by the learned trial

judge in his opinion, it was held that the defendant was not liable because in that case there was a new, intervening cause of the injury, which relieved the defendant from liability. In that case the plaintiff's cotton in a warehouse was insured against fire. The insurance company's policy contained an exception against fire which might happen by means of an explosion. An explosion took place in another warehouse across the street, resulting in an extensive conflagration embracing several squares of buildings, and among them the warehouse where the cotton in question was stored, which was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but first consumed several intermediate buildings, but the whole fire was a continuous affair from the first explosion and in full headway in about half an hour. The court held under those facts that by reason of the exception in the policy the company was not liable. We submit that it is not indicated in the learned opinion of the trial judge in this case how the said decision in the Tweed case was in any way applicable to the case at bar.

The case of *Ry.* v. *Reeves*, 10 Wallace, 176, which is also cited by the learned trial judge in his opinion, is one of the principal cases, if not the principal case, relied upon by the defendant in error. In the Reeves case there is to be found in the opinion no intimation that the question of proximate cause was not one for determination by the jury. The case was tried in the trial court by a jury and a verdict given against the railway company. The judgment on that verdict was reversed by this court and a new trial ordered. The reversal is based upon misdirection by the trial court of the jury, but there is no intimation anywhere in the short opinion delivered by Mr. Justice Miller that the question of

proximate cause was a question to be determined by the court and not by the jury. The opinion throughout proceeds upon the theory that the question of proximate cause was one for the jury, to be determined by that tribunal under proper instructions of the court, and that the trial court in that case had not given proper instructions. In the opinion in that case it was also adjudged that the carrier, notwithstanding the fact of the existence of an act of God in the form of a storm or flood, is required nevertheless to exercise ordinary diligence to avoid or remedy the effects of the overpowering cause. The injury to the shipment in the Reeves case occurred at Chattanooga, where Mr. Justice Miller says: "There was a most sudden, violent and extraordinary flood." There was, however, nothing in the Reeves case to show that the carrier for four or five days prior to the damage at Chattanooga had held up the shipment for several days 150 or 200 miles distant from Chattanooga, and there was nothing in the Reeves case to show that the carrier had several days' time within which it knew of the existence of the flood, and the facts of that case render it entirely different from the case at bar. There was no deviation in the Reeves case. The court in its opinion in the Reeves case says: "If after he has excused himself by showing the presence of an overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." This language is a clear recognition of the proposition that contributory negligence on the part of the carrier, co-operating with the act of God to produce a loss, renders the carrier liable. Indeed, this proposition could not be denied, being sustained by all of the authorities. However, the learned trial judge in his opinion in this case says: "It is not enough in this case that plaintiffs show that some act

of negligence of the defendant furnished the occasion for the loss or that some act of negligence of the defendant contributed to the injury." We think that the opinion of the trial judge in this case is the only one that will probably be found in the books, where it is asserted that the contributory negligence of the carrier, co-operating with the act of God, does not render the carrier liable. In the Reeves case the trial court by its 5th instruction told the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for the plaintiff. The court in the opinion of Justice Miller adjudged that the rule of this instruction was too stringent and reversed the judgment and remanded the case for a new trial.

The case of *Scheffer* v. *R. R.*, 105 U. S., 249, is also cited by the learned trial judge in his opinion. In that case by reason of a collision of railway trains in Virginia a passenger was injured and, becoming thereby disordered in mind and body, he, eight months after his injury, committed suicide, and it was held in that case, which was a suit by his personal representatives against the railway, that his own act of suicide was the proximate cause of his death.

In the case of *Ry. Co.* v. *Ins. Co.*, 139 U. S., 223 which is also cited by the learned trial judge in his opinion, it appears that the railway company had contracted with a compress company to receive and transport all cotton brought by its owners to the warehouse of the company. The railway company neglected to do this, a large mass of cotton was piled and kept by the compress company in the adjoining street, where the cotton thus collected was destroyed by fire from an unknown cause. It was held that the railway company was not responsible for the loss to the owners of the cotton destroyed, for

the reason that the railway company had given no bills of lading for the cotton in the street and the railway company had in fact assumed no custody or control of any of the cotton in the street or of the place where it was kept.

In the case of *The R. D. Bibber*, 50 Fed. Rep., 841, which is also cited by the learned trial judge in his opinion, it appears that a schooner loaded with a cargo of rails to be transported under a bill of lading which excepted liability from dangers of the seas, arrived off the bar at Galveston Harbor. While crossing the bar the vessel from some unknown cause went fast aground. The following night a storm arose which lasted two days and drove the vessel half a mile from the channel and on some shoals. The owner of the cargo brought suit against the vessel to recover the damages, alleging that the stranding was caused by the negligence of the master in not properly lightening the schooner before attempting the bar. The court there held that the grounding of the schooner was not due to the negligence of the master, and that the subsequent storm which arose the following night was the proximate cause of the injury. The case there might have some application to the case at bar if, after the cattle in controversy in this case had nearly reached Emporia while in transit, they had been overtaken by a sudden cyclone, throwing the train off the track and killing the cattle. On those facts the decision in the Bibber case and the decision in the Reeves case might apply; but in the case at bar the negligence of the defendant company commenced and continued after the flood was on and until the climax of the flood was reached. Indeed the negligence of the defendant company seems to have increased from the time of the arrival of the cattle at Strong City until the climax of the flood, in about the same proportion as the increase of the flood.

In the case of *Thomas* v. *Lancaster Mills*, 71 Fed. Rep., 481, which is another authority cited by the learned trial judge in his opinion, it was held that the fact that the destruction of a shipment by fire, occurring during a negligent delay on the part of a carrier in forwarding it, does not render such delay the proximate cause of the loss. That decision would have some application to the case at bar if the cattle of these plaintiffs had been destroyed by a sudden and unexpected fire at Emporia after the two days' negligent delay at Strong City; but in the case at bar, as we have seen, the negligence of the railway company from its commencement at Strong City until the climax of the flood, existed throughout from beginning to end after the flood was on. This flood was not a sudden affair like a fire, a cyclone or a thunder storm. It had continued for several days. In the above cases cited by the learned trial judge, if the carrier had been negligent during or after the fire or the storms, or while the fire or storms were on, as in the case at bar, the court would, we think, not have said that the carrier was exempt from liability for its contributory negligence. In the cases cited by the learned trial judge the negligence in each case existed some time anterior to the fire or flood, which in each case came on suddenly and unaware, and did not in any of the cases exist previously to the negligence of the carrier.

The case of *Hoag* v. *R. R. Co.*, 85 Pa., 293, which is also cited by the learned trial judge in his opinion, does not have any application in its facts to the case at bar.

VIII.

We submit that the error of the trial judge is further shown by the following clause of his opinion at page 140: "That it was wholly unanticipated in height and "destructive force is manifest by the undisputed fact

"that millions of dollars worth of property was placed "and left in the valley here at Kansas City by the own- "ers thereof, which was inundated and destroyed." But that "millions of dollars worth of property consisting "as it did of inanimate houses, stocks of goods and fur- "niture therein was placed and left in the valley here "at Kansas City by the owners thereof" long before the commencement of this flood, and it was not possible to move either those inanimate buildings or the immense stores therein at any time during the last week of the flood. There is another fact in this connection not mentioned in the learned opinion of the trial judge: There was not a single head of cattle in any of the Kansas City packing houses when the flood reached its climax, and only a comparatively small number of cattle, in addition to the large bunches of these plaintiffs', was in the Kansas City stock yards, although its daily receipts were up into the thousands and tens of thousands of cattle. Sparks Bros. had driven their large herd of mules out of the valley and nearly all the animals which have legs to walk upon were shipped or driven out in time to be saved, and the evidence does not show any live stock loss worthy of mention, except the loss of these plaintiffs.

IX.

At the bottom of page 138 the learned trial judge in his opinion seems to assume that it was necessary to drive the cattle up into the viaducts. The judge says: "To save the cattle in question from drowning they were "driven up into overhead viaducts." It was unnecessary to drive the cattle up into the viaducts, where they died for want of food and water, if as the trial judge found they could and should have been driven up out of the valley or shipped out on cars as was done with other live stock. The flood was not the cause of the death of

the cattle that died in the viaducts. The cattle were not any of them drowned. They died for want of food and water in the viaducts where they were placed by a human agency, namely the defendant company. If the damage must be ascribed to the last, in the train and succession of events, as was the opinion of the learned trial judge, then the want of food and water in the viaducts where the cattle were driven by men, and not the flood considered as an act of God, was the direct, immediate and proximate cause of the loss. And if the driving of the cattle up into the viaducts was made necessary by the neglect of defendant to drive or ship the cattle up out of the valley, then such negligence and the act of driving the cattle up into the viaducts were the last, efficient, immediate and direct cause of the loss and damage. Some of the authorities agree that where human agency containing no element of negligence contributes to produce the loss, the carrier is not excused by the act of God.

Steamboat Co. v. *Tiers*, 24 N. J. Law, 697; The Majestic, 166 U. S. 376, l. c., 386; *Merritt* v. *Earle*, 29 N. Y., 115, l. c., 116; *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570, cited in 154 U. S., 66.

X.

• The several acts of negligence charged in plaintiffs' petition constitute in their entirety one continuous negligence on the part of the defendant. Each negligence followed the preceding negligence. All those negligences had relation to the flood which preceded them. The case ought not to be decided upon the narrow theory or basis that either one of the first negligences in the train, considered by itself, was not the proximate cause of the injury. If the question of those negligences was a ques-

tion of fact for the jury, then the trial court erred in not submitting that question to the jury. If the question of the liability of the defendant upon the train of successive negligences was a question for the court, because of the fact that the evidence is undisputed, then the trial court erred in not ruling that question in favor of the plaintiffs. If the evidence upon the question of the train of negligences is undisputed, then we submit that the undisputed fact shows a case of very gross and almost criminal negligence on the part of the defendant company from first to last, and continuing through all the train and continuation of negligences.

The case therefore on the branch of negligence upon either theory of fact or law, must, as it seems to us, be ruled in favor of plaintiffs and against defendant. Either the plaintiffs were entitled to a submission to and a verdict of the jury upon the issue of negligence on all the specifications, or plaintiffs were entitled to the judgment of the court thereon.

ARGUMENT.

I.

In the case of *Rwy. Co.* v. *Harris*, 12 C. C. A., 598, l. c., 602, it was held that where a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on defendant's objection, defendant will not afterwards be permitted to allege that plaintiff failed to prove the facts alleged in the offer of evidence. We submit that the very many items of evidence offered by plaintiffs and wrongly and erroneously excluded by the learned trial court, should be considered by this court on these appeals with the other testimony of plaintiffs which, in some instances, was so reluctantly admitted.

II.

Upon the issue of negligence we refer to the following authorities:

In the case of *Livezey* v. *Philadelphia*, 64 Pa. St., 106, l. c., 108, the court in an opinion delivered by Sharswood, J., recognized the principle that where negligence concurs with the act of Providence in causing the injury the defendant is liable, and an opinion of Chief Justice Gibson is cited, recognizing that where the act of Providence was relied upon the happening of the injury must have resulted exclusively from such act of Providence. This does not harmonize with the opinion of the learned trial court in this case that contributory negligence does not render the carrier liable.

So in the case of *Helbling* v. *Cemetery Co.*, 201 Pa. St., 171, the court recognized that where the negligence of the defendant concurs with the act of God in produc-

ing an injury the defendant is liable. In that case there was a judgment for the plaintiff against the cemetery company for $3,500, which was affirmed by the Pennsylvania Supreme Court. The suit by the plaintiff was brought because of injury by water during rain storms to plaintiff's house. The water accumulated at the opening of a city sewer which was on the land of the defendant cemetery company, which sewer received the surface drainage. The negligence of the cemetery company charged was that it had allowed large quantities of brush, weeds and grass to lie along the water courses near the opening of the sewer, and that this so clogged the water it did not have a free passage to the sewer. The defense was that the rainfalls were so extraordinary that their consequences could not be forseen, and that the injury was therefore attributable solely to an act of God. The appeal presented the question of instructions to the jury in the trial court. The trial court instructed the jury that if the loss resulted wholly from extraordinary floods and not from any act of the defendant, the defendant was not liable. The trial court gave an instruction to the jury in words as follows: "If, however, the weight of the evidence satisfies you that the loss was the result of two concurrent acts, an extraordinary flood and some negligence of the cemetery company assisting in producing the loss, then the cemetery company would be liable." Under this instruction the jury found a verdict for the plaintiffs, which was sanctioned both by the trial court and the Supreme Court.

In the case of *Morrison* v. *Davis*, 20 Pa. St., l. c., 176-177, the court used the following language: "We may here say a word as to the care required of carriers when they discover themselves in peril by inevitable accident. In such a case the law requires of them ordinary care, skill and foresight. This is different in different

cases, depending upon the degree of civilization, and in different circumstances depending upon the degree of peril. It is commonly defined as the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. It increases as difficulties increase. In great danger great care is the ordinary care of prudent men."

In the case at bar the learned trial court was of opinion that no matter how negligent the carrier may have been, still if there was a flood, or act of God as it is called, there is and can be no liability. The trial court seems also to be of opinion that the carrier must have known all the facts before the crisis of the flood that are known now in order to be liable. In the view of the trial court there is nothing left of the law of negligence and there can be no liability in this class of cases.

In the case of *Williams* v. *Grant*, 1 Conn., 487, the court adjudged that the striking of a vessel upon a rock not generally known, and not actually known to the master of the vessel, is *prima facie* an act of God, for which the carrier is not responsible. The court further adjudged that though the situation of the rock was not generally known and was not actually known to the master of the vessel, yet if he exposed the vessel to such accident by any culpable act or omission of his own the defendant was not excused. The verdict in the trial court was in favor of defendants, but the Supreme Court granted a new trial. In one of the opinions of the court in that case it is said, in speaking of dangers of the sea and unavoidable accidents, as follows: "In either case, however, it is a condition precedent to their exoneration that they should have been in no default, or, in other words, that the goods of the bailors should not have been exposed to the peril or accident which occasioned the loss by their own misconduct, negligence or ignorance.

For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God or unavoidable accident, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. I recollect a case put in some book to this effect: That if a common hoyman unnecessarily puts to sea under circumstances which render a loss of the goods on board probable, as in very tempestuous weather, he is liable in the event of loss, though it were immediately occasioned by the elements, over which he had no control. This I take to be the law."

This case is approvingly cited by this court in *Constable* v. *Steamship Co.*, 154 U. S., l. c., 66.

In the case of *Wallace* v. *Clayton*, 42 Ga., 443, the court adjudged that an unusual or extraordinary flood in a river is such an act of God as excuses a common carrier from his liability, at all events for goods he has undertaken to transport, but even in such case the carrier is bound to exercise the care of a very prudent man to preserve the freight entrusted to him for carriage. It was also held in that case that diligence and the want of it are questions of fact to be determined by the jury under the charge of the court. In its opinion in that case the court said: "It cannot for a moment be denied that a flood such as the evidence in this case discloses is an act of God in the sense of the books, which make such an act an exception to the influences against which a common carrier insures. Indeed the irresistible march of a mighty and unexpected flood is of all others the most terrible exhibition of the powers of nature and the helplessness of man. It is only the Ruler of the Universe who can say with authority to the rushing tide, 'Thus far shalt thou come and no farther.' When such an event occurs, that rule which makes a common carrier

liable at all events gives way. Angel on Carriers, 153-160. But it does not, therefore, follow that the carrier may fold his hands or that he is to be excused if he is negligent or fails in exercising the diligence of a very prudent man. That duty is always upon him. Even amid the fury of the storm or the rush of the flood he must use that prudence, discretion and energy which experience teaches very prudent men to use under such circumstances. If the loss be by reason of the want of extraordinary diligence in the carrier, then, though the agent of the loss be flood or storm, the carrier is liable. Angel on Carriers, 153-160."

The case of *Richmond R. R. Co.* v. *White*, 88 Ga., 805, is directly in point. In the state of Georgia, where that case arose, there was a statute which provided as follows:

> "Sec. 2066.—One who pursues the business, constantly or continuously for any period of time or any distance, of transportation is a common carrier, and as such is bound to use extraordinary judgment. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state."

This last clause of the statute it will at once be recognized is simply in affirmance of the common law. In the above case the Georgia Supreme Court adjudged the following: "The rule of extraordinary diligence imposed upon common carriers by Sec. 2066 of the Code required the exercise of that degree of diligence to avoid unduly exposing goods to injury or destruction by an unforeseen act of God, such as an extraordinary flood or freshet, and also to protect and preserve the goods after the peril has become apparent. And generally, in order for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon

him to establish not only the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto. For in cases of loss the presumption of law is against him." It was also adjudged in that case that: "After it is shown by dates of shipment that the goods had time to arrive and be delivered to the consignee before the flood occurred, the burden of showing what part of the goods, if any, did not arrive within that time is upon the carrier, and then the burden is upon the consignee to show the damage done to those which did arrive and the amount thereof, in order to recover on the ground of negligence in not giving notice of arrival or in not delivering on application."

It was also adjudged in that case that "As to goods which arrive too late to admit of giving the usual notice to consignees before the flood occurred, the carrier was bound to the exercise of extraordinary diligence in protecting them from damage by the flood whilst they were in his cars or his warehouse." It was also adjudged as applicable to such cases, where goods are overtaken by a flood, that "The measure of extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property, and that the acts and efforts constituting that diligence under all the circumstances of the case were for determination by the jury." It was also adjudged in that case that "*Precautions for the protection of property which would have been available as against any previous flood of which the carrier, a railroad company, had knowledge, would not necessarily fill the measure of extraordinary diligence, inasmuch as history or tradition might make it incumbent on the carrier to have more knowledge than that actually possessed, and that in such matters it might be just to treat the means of knowledge as equivalent to actual*

notice." The court in its opinion in that case recognized the difference between the extraordinary diligence required by the above statute in Georgia and the ordinary diligence required by the common law. However, what the court says in its opinion in that case about a liability where there is concurring negligence on the part of the carrier, applies as well to cases arising where the common law rule obtains as to cases arising under statutes like that of Georgia under consideration in that case. In its opinion commencing at page 812, the court there says: "We think, moreover, that this is where the burden ought to rest, for in its nature the defence of loss by the act of God involves a due accounting by the carrier of his own diligence so as to make it appear that the loss was occasioned by the act of God solely, unmixed with contributory negligence on the part of the carrier. *Doubtless where the carrier is in no previous default and the Providential act is so sudden and of such a nature as to leave no interval of time within which preventive measures against its effects could be taken, the mere proof of the act alone and of the consequent loss would establish the defense. This would be reasonable. But where the circumstances make a plain case for the exercise of some diligence and time for its exercise intervenes after the peril has become apparent, the burden of showing that the requisite diligence was exercised ought to rest upon the carrier.* The inquiry relates to his conduct, and he, his servants and agents, must know what that conduct was, and they of all persons have the best means, and not infrequently the only means, of proving it." Again, at page 814, in its opinion in that case the court said: "It came out in evidence that a part of the goods embraced in this action and which were injured by the flood, arrived at the company's warehouse in time to have been received by the

consignee and removed before the freshet occurred, and that there was not only an omission to give the notice of arrival customary in the business, but probably that these goods, or some of them, were detained by the carrier after they had been applied for by a drayman in behalf of the consignee. So far as these packages of goods were concerned the carrier failed in diligence and thus unduly exposed the goods to loss, before it was known, or could be known, that they had been put in peril by the particular act of God which subsequently affected them to the owner's damage." In that case the court, as is thus seen, affirmed a liability against the carrier because of the want of proper care on the part of the carrier in advance of the flood, and even in advance of the knowledge of the carrier that a flood was about to come. In that case as to some of the goods, they were not unduly delayed on the way and did not arrive until it was too late to give notice to the consignee before the freshet occurred, and as to these goods the court held that the carrier was bound to exercise diligence in protecting those goods from damage by the flood whilst they were in his cars or in his warehouse. Upon the branch of the case as to the existence of the danger, the question whether in that case the carrier exercised proper care to save the goods after the flood was on, the Supreme Court said: "The question for the jury was whether the company did as much as it could or ought to have done under the rule of diligence to which it was subject and under all the circumstances which surrounded it." The court in its opinion in that case clearly recognized that it was the duty of the carrier to exercise either ordinary diligence under the common law or extraordinary diligence under the statute, to save the goods after the flood was on, and the court also regarded the question whether the carrier did exercise

diligence as a question for the jury. At the conclusion of the opinion the court made the following observation, namely: *"We agree with the trial court that the precautions for the protection of the property which would have been available against any previous flood of which the company had knowledge would not necessarily fill the measure of extraordinary diligence. This flood was in the year* 1888, *and there had been a higher one in the year* 1840. *History or tradition might have made it incumbent on the company to have some knowledge or information as to that instance of high water. Many persons still living would be likely to know of it and it might or might not be just to treat as against the railroad company its means of knowledge as actual notice. The jury would be apt to deal rightly with such a question."*

In the case of *Merritt* v. *Earle*, 29 N. Y., l. c., 116 F, in which an elaborate opinion was delivered on this subject, the court said: "The force of inevitable accident goes a step further and applies to occurrences which no foresight or precaution of the carrier could prevent, but even this is not identical in meaning with the 'act of God.' That is an expression which excludes all human agency. It signifies the direct act of a Providential cause, for in a wider sense everything is an act of God, since nothing happens but by His permission." The learned judge proceeds to review the authorities, English and American, and concludes as follows: "It is a corrollary from these principles and the cases in which they are found that if the act of God is to excuse the carrier, it must be not only the sole, but the immediate, and not the remote cause of the loss." And in that case it was adjudged that if either the negligence of the carrier, or the intervening act emanating from any human source, contributed with the act of God to cause the in-

jury complained of, the defendant is not excused by the act of God, but is liable by reason and force of its general liability as a carrier. In the case at bar the defendant as a carrier is undoubtedly liable to plaintiffs for the loss and injury of these cattle, if the defendant is not excused by the act of God as the sole cause of the injury complained of; and if either the negligence of the defendant or any other action emanating from a human source contributed with the act of God to cause the loss and injury to plaintiffs, the defendant is still liable.

The same principle was recognized by the court in the case of *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570. In that case the court said: "This was in substance the case disclosed and the question recurs, whether the judge erred in holding the defendants liable. In other words, whether the defendants as carriers brought themselves within one of the two exceptions to their legal liability. What is precisely meant by the expression, act of God, as used in the case of carriers, has undergone discussion, but it is agreed that the notion of that exception is, those losses and injuries occasioned exclusively by natural causes such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of injury or loss. If the loss or injury happened in any way through the agency of man, it cannot be considered the act of God. Nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the 'act of God' or *vis divina* must be the sole and immediate cause of the injury. If there be any co-operation of man or any admixture of human means, the injury is not in a legal sense the act of God."

And after using this language the court cites, in support of the above propositions, many authorities.

See also the learned remarks of Cowan, J., in *McArthur* v. *Sears*, 21 Wendell, 190, l. c., 197.

The above case of *Michaels* v. *R. R. Co.* is approvingly cited by this court in *Constable* v. *Steamship Co.*, 154 U. S., 66.

In the case of *Bibb Broom Corn Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 102 N. W. Rep., 709, which was decided by the Supreme Court of Minnesota on Feb. 24, 1905, the identical flood of May, 1903, which is involved in the cases at bar was there considered by the court. On the same facts which were brought out in that case, so far as the flood was concerned, which are involved in the cases at bar, the Minnesota Supreme Court adjudged the following propositions: "(1) It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly and without unreasonable delay to their destination; (2) if he fails so to do and negligently and carelessly delays the shipment and the goods are overtaken in transit and damaged by an act of God which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligent and unreasonable delay is such proximate or concurring cause as renders the carrier liable." The opinion is exhaustive and contains the citation of many authorities, English and American. In that case the trial court instructed the jury in part that if the corn was destroyed by an act of God unaccompanied by the concurrent negligence of the defendant, plaintiff could not recover, but in effect left the jury to say whether the delay in forwarding the car was negligence and whether such negligence concurred in causing the damage. This instruction was approved by the

Minnesota Supreme Court and the judgment of the trial court was affirmed. The rule applicable to this class of cases is thus stated by the court in its opinion in that case: "As a general rule applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's negligence and some other cause for which he is not responsible, including an act of God, he is nevertheless liable, if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own. * * * The authorities are at variance insofar as negligent delay is concerned, only in cases involving property not perishable. The principle in the case at bar was of that character. The property would not have been damaged but for the flood that submerged the car while in the yards at Kansas City. Neither would it have been damaged had defendant forwarded the car to Minneapolis promptly and without unreasonable delay, as it was required by law to do. So the question is, was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in causing the damage?" The court then proceeds to an examination and consideration of the authorities bearing on the question and then proceeds in its opinion as follows: "We have examined the authorities holding the opposite of this doctrine and while the courts adhering to the same are of eminent standing, we have no difficulty in adopting the view in the cases above cited. The rule which permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault, seems to us unsound or as based on too strict an application of the rule of proximate cause. It is the duty of a common carrier, to whom goods are delivered for transportation, promptly and

without unreasonable delay to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at defendant's yards in Kansas City on the 23rd of May and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival, prior to the 29th of May, and had this been done the corn would not have been damaged. If defendant had acted as required by the terms of its contract and as enjoined by law, the car would have been forwarded and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of Good seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense. Every reason in equity and justice relieves a carrier from the performance of his contract and from liability to injuries to property in his custody for transportation, resulting exclusively from the act of God or other inevitable accident or cause over which he has no control and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If but for his negligence the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong, and if a loss occurs while his wrongful act is in operation and force and which is

attributable thereto, he should be held liable. *Davis* v. *Garrett*, 6 Bing., 716."

In the case of *Cobb* v. *Ry.*, 149 Mo. Rep., 609, l. c., 628, the court said: "And the fact, if it was one, that the storm had been unprecedented, affords defendant no excuse, because if a hard rain storm would sweep bents *a fortiori*, would one more severe? And the evidence unmistakably shows that had stone piers been used, defendant would have given no cause for the present litigation. *The unusual severity of the storm in this instance, instead of furnishing an excuse to defendant, should rather have struck the spur of vigilance into the flank of its apprehension.*"

In the case of *Davis* v. *R. R. Co.*, 66 Vt., 297, l. c., 298, 29 Atl. Rep., 313, l. c., 315, the Supreme Court of Vermont in 1894 delivered an opinion in which the following language is used: "But it is contended that the delay or negligence of the defendant in not removing the grain as speedily as the county court has found that it ought to have done, renders the defendant liable. It is evident that the fire was the immediate, proximate cause of the destruction and loss of the grain. If the fire had not occurred, or if that cause is eliminated, the grain would not have been lost. The *causa causans* was the fire. The concomitant incident was the delay by the defendant in removing it from the elevator. But that delay would not have destroyed the grain, and caused its loss, if the fire had not intervened. It is generally held that a common carrier is liable on the ground of negligence only when that negligence is the proximate cause of the loss. On this subject, and on what is the proximate and what the remote cause, these authorities are helpful: *Bohen* v. *City of Wasecа*, 32 Minn., 176, 19 N. W., 730, 50 Am. Rep., 564, and note; *West* v. *Ward*, 77 Iowa, 323, 42 N. W., 309, 14 Am. St. Rep.,

284, and note; *White* v. *Conly*, 14 Lea., 51, 52 Am. Rep., 154, and note; *Haverly* v. *Railroad Co.*, 135 Pa. St., 50, 19 Atl., 1013, 20 Am. St. Rep., 848, and note; *Perley* v. *Railroad Co.*, 98 Mass., 414, 96 Am. Dec., 645, and note. But courts differ in holding the carrier liable when his delay is the remote cause of the loss, and a proximate cause exists therefor, for which he is not liable. Courts of last resort, holding the carrier liable in such cases, are those of New York, followed by those of Missouri and Illinois. Holding that the carrier is not liable for such remote cause, are the courts of the United States, Massachusetts, Pennsylvania, Ohio, Michigan, West Virginia and Iowa. The cases of these states, pro and con, can be found collected in a note to *Norris* v. *Railway Co.*, 23 Fla., 182, 1 South, 475, 11 Am. St. Rep., 355. To the last named class, apparently, should be added the courts of Nebraska and of Maine. *McClary* v. *Railroad Co.*, 3 Neb., 44; *O'Brien* v. *McGlinchy*, 68 Me., 557. *In some of the cases cited, holding the carrier liable, another element existed, in addition to the delay of the carrier in moving the goods to their destination, to-wit, the exposure of the property to the action of the elements, which was observable to the carrier, like freezing, or the want of food and care when the property consisted of live animals. When the property is of a kind liable to injury or destruction by such exposure, whether moving the property with due dispatch, or delaying so to move it, the carrier is under a duty to use common prudence to protect the property from dangers which are known to him to exist, and which have come expectedly or unexpectedly; and, if the danger came without his fault, he may charge for the extra care. Beckwith* v. *Frisbie*, 32 Vt., 559. *Some of the cases holding the carrier for delay might have been properly decided against him because, knowing the danger to*

which the property was exposed, he did not exercise the diligence and care of a prudent bailee to protect it."

In this case Messrs. Hurley and Sharp, who were the general superintendents of defendant, seemed to have thought they owed a duty to remove the 1,400 cars of dead freight from Argentine on May 30th, but that they owed no duty to care for plaintiffs' live stock.

In the case of *R. R. Co.* v. *Curtiss*, 80 Ill., 324, the Illinois Supreme Court held the following: "If fruit trees and shrubbery are destroyed by the cold in the hands of an intermediate carrier by reason of negligence or unreasonable delay, or if by such delay in transportation or in delivering to the next carrier in the line the latter cannot by reasonable efforts transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss." It was also held in that case that: "Where fruit and ornamental trees shipped were destroyed by frost before reaching their destination, and this was caused by delay of transportation to Chicago, where they were to pass into the hands of another line, the fact that the company's buildings in Chicago were desroyed by fire will not furnish a sufficient excuse for the delay *where it appears that other shipments made afterwards went through in time and were delivered to the other line.*" In speaking of the duty of the carrier in that case the court in its opinion delivered by Judge Walker, said: "The cold weather was approaching and the hazard of delay was increasing, and it required, considering the nature of the freight and its liability to injury from frost, that all reasonable efforts should have been made to get them in the hands of the next carrier in the line before winter should set in or the weather become severely cold. Failing to do so, appellants were liable for the neglect."

In the case at bar the first train load of cattle of

the Empire State Cattle company was hauled through from Strong City to South Dakota on time, and if the same care had been used by defendant as to the second train load in moving it homeward without delay from Strong City the loss would have been prevented. See on this point the well considered case decided April 30th, 1907, by the St. Louis Court of Appeals of *Gratiot W. H. Co.* v. *R. W. Co.*, 102 S. W. Reporter, p. 11, l. c. 16.

In the case of *Wald* v. *R. R. Co.*, 162 Ill., 545, the Supreme Court of Illinois held the following: "A loss or injury is due to the act of God where it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. A common carrier is not exempt from liability for a loss occasioned by an act of God if the carrier has been guilty of any previous negligence which brings the property in contact with a destructive force or unnecessarily exposes it thereto. A carrier is responsible where property committed to it is by its negligence brought under the operation of natural causes that work its destruction or is exposed to such cause of loss. Unnecessary delay of a carrier which subjects the goods in its possession to a loss by an act of God, which they would not otherwise have met with, is of itself such negligence as will make the carrier liable for the loss. A carrier which without sufficient reason fails to ship the trunk of the passenger upon the limited train taken by such passenger, is liable for its destruction by a flood which comes upon the later train upon which it is shipped, though such flood is in itself an act of God." It was further held in that case that "it is a question of fact for the jury whether or not a railroad company is guilty of negligence in not sending a passenger's baggage by the train on which he travels and having it so carried throughout the jour-

ney." In that case the plaintiff took passage from Cincinnati over the defendant railway company to New York City on a limited express train. The plaintiff had his trunk checked from Cincinnati to New York. The railway company neglected to ship plaintiff's trunk by the train on which he took passage, as the company could and should have done, but the trunk went forward on a later train, which later train was caught in the Johnstown, Pa., flood, where appellant's baggage was lost. In the opinion in that case, which is exhaustive and contains the citation of many authorities, there is a full consideration of the subject of proximate cause in these cases, and the rule which has been generally recognized by the courts (except possibly the trial court in the case at bar), that if there is concurring negligence on the part of the carrier, the fact that the injury was caused by an act of God is not a defense.

In the case of *Blodgett* v. *Abbott*, 72 Wis., 516, 7 Am. St. Rep., 873, the court adjudged that the defendant carrier was not excusable because it thought the next connecting carrier might have trouble in the continued transit of the goods.

According to that authority the fact that defendant thought while plainiffs' cattle were at Strong City that they might not be carried by the connecting carrier beyond Atchison was no excuse for the delay. Indeed the evidence in this case is undisputed that if defendant had moved forward this train load of cattle the same as plaintiffs' other train load, it would have gone through the same to the destination of both.

In the case of *Nelson* v. *Ry. Co.*, 72 Pac. Rep., 643, l. c., 651, decided by the Supreme Court of Montana in 1903, it was held that a common carrier receiving property for transportation, with knowledge of the existence of an obstruction on its route, and without informing

the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God, and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it. In the opinion of the court in that case the court said: "Another instruction given is as follows: 'The court further instructs you that if you find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. *It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.*' The appellant complains of this instruction for the reasons (1) there is no evidence to base it upon; (2) that it is an erroneous statement of the law. The record contains evidence as to the prevalence of a storm at the time this shipment was made; that the probability of obstruction was discussed, defendant's witnesses testifying that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing in North Dakota along the line of defendant's road. The receipt of this information was denied by plaintiff, and the question as to the exist-

ence and severity of the storm and the dangers attendant upon the shipment became and was one of the issues in the case. As to the second objection made by defendant to this instruction, we can only say that we find no error, but believe the same to state correctly the law as applicable to this case. The general rule governing this matter is expressed in *Lamont* v. *Nashville R. R. Co.*, 9 Heisk. (Tenn.) 58, in which the court says: *"The company were bound to take notice of the signs of approaching danger, and, if of such character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.'* Further sustaining this general proposition of law, we cite the following authorities: *Fox* v. *B. & M. R. R. Co.*, 148 Mass., 220, 19 N. E. 222, 1 L. R. A., 702; *Corbett* v. *St. Paul, M. & O. R. R. Co.*, 63 Wis., 82, 56 N. W., 327; *Hewitt* v. *Chicago Ry. Co.*, 63 Iowa, 611, 19 N. W., 790, 5 Am. & Eng. Enc. Law (2d Ed.), 255; *Express Co.* v. *Jackson*, 92 Tenn., 326, 21 S. W., 666."

In this case we submit that General Superintendents Hurley and Sharp had no right on May 30 to speculate as to how high the then existing and unprecedented and continually rising flood might reach, or guess or take chances as to the exact number of feet up to which it might go. This is also true as to conditions Friday, when the cattle were deviated from Emporia.

In the case of *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697, the court held: A common carrier is not excused from his liability when the loss is occasioned by the act of God, unless the act of God is the proximate cause of the injury, nor where the negligence of himself or any other person concurs with the act of God in producing the loss. That a severe storm produced

an unusually low tide and thereby caused the carrier's barge to strike against a timber projecting from a wharf, so low as in ordinary tides to be no cause of injury, will not excuse the carrier from the loss of the goods occasioned by the timber piercing the vessel. It was further held in that case that the doctrine that where both parties are guilty of negligence there can be no recovery, does not apply to the owner of goods delivering them to a carrier during a storm in which it may be difficult for the carrier to protect them. If the carrier consents to receive them he is liable for all injury after delivery. The opinions in this case contain the citation of many authorities. In the opinion at page 700, the court says: "Admitting that the loss in this case was occasioned, not by negligence in leaving the barge in a situation where she was liable to strike against the bulkhead, instead of securing her better, but that in point of fact the loss was occasionad by the low tide bringing her in contact with a timber projecting a foot or more in the bulkhead, and that that concurrence of a low tide produced by a violent storm, itself strictly an act of God, and the projecting timber which was left to project by the agency of man, was it a loss by the act of God, for which the carrier is not responsible? I am clearly of the opinion it was not. The immediate or proximate cause of the loss was the projecting timber, and defendant strenuously insists that it was not the mere influence of the storm casting the barge against the bulkhead which produced the injury, and this they are driven to do in the hope thus to escape the consequences of their negligence in allowing her to remain unnecessarily in a position where this might have happened. Admitting this negligence, they say it did not occasion the injury. Had the bulkhead been free from defect, as they supposed, no injury would have occurred. The remote cause of the loss was undoubtedly the storm, but had there been

no projecting timber their argument in that case would have been inefficient as that the real producing and proximate cause was the projecting timber. It is the duty of carriers to provide good and sufficient docks, boats and other implements necessary and proper for their business, and although these instruments need not be absolutely perfect, they must be free from defects, seen or unseen. If defects do in point of fact exist, the carriers are not excused, even if it be shown that they have exercised extraordinary diligence to prevent them. In the case of *Backhouse* v. *Snead*, 1 Murphy N. C. R., 173, it was held that where the carrier hired his vessel to be repaired by a skillful workman, who made a rudder apparently sound, but internally rotten, and the loss happened by reason of its breaking, he was responsible, though he was ignorant of the defects. This decision was in accordance with the general principle which holds the carrier responsible for every loss produced by an accident not coming within the definition of an act of God, as for a loss occasioned by a fire which happened without any negligence on his part or by robbers or by the misconduct or negligence of third parties; the question in such cases is not whether there has been any degree of negligence on the part of the carrier, but whether he has shown that the proximate cause of the loss was an act of God or of public enemies. Against all other causes of loss he undertakes to insure, and if the accident which occasioned it was not an act of God or of enemies, but was wholly without his fault, it was at all events his misfortune and not the misfortune of the owner. The argument for the defendants in this case is that inasmuch as if there had not been an unusually low tide, produced by a violent storm of wind, the barge would not have struck the timber; therefore, the loss must be attributed to the storm. But if that argument was sound, it would follow that if an unsea-

worthy vessel should founder in a storm, the fact that she might have gone safe if the weather had remained fair would excuse the carrier. This is not pretended to be the law. If a vessel be in fact unfit for her business, a loss arising from a storm is presumed to have been occasioned by the defect of the vessel, because it is impossible to say how far the defect contributed to the loss. Upon the like principle if the carrier's dock be imperfect, a loss arising by the influence of a storm acting upon the imperfection and which would not have happened in the absence of either cause, must be attributed to the imperfection. The loss is not by an act of God alone. It is produced partly by an act for which the carrier is responsible. Had there been no storm, but had the dock itself given way and sunk the vessel, or had a projecting timber before unnoticed, or believed not to be dangerous occasioned the injury, since no act that could be called the act of God had intervened, it is undeniable that the carriers would be liable. In this case an act of God did intervene and was instrumental in producing the loss, but it was not the sole or proximate cause of the loss. And defendants themselves insist and assume in the charge they desire that the storm itself did not do the injury. Had not another instrument concurred which proceeded from the active or passive agency of man and for which man is responsible, there would have been no loss.'

In the case of *R. R. Co.* v. *David*, 6 Heisk. 261, it was held that "when goods in the hands of a common carrier are placed in jeopardy by some *vis major* he is bound to use actively and energetically such means to save them as prudent and skillful men engaged in that business might fairly be expected to use under like circumstances. It is error, therefore, to charge the jury that in such case the carrier is bound to use all the dili-

gence which human sagacity can suggest." The court in that case, in speaking of the case of *R. R. Co.* v. *Reeves,* says: "The sounder rule is thus given by the Supreme Court of the United States, citing from 20 Pa. Rep., 171, in the case of *R. R. Co.* v. *Reeves,* 10 Wallace, 191, that when carriers discover themselves in peril by inevitable accident the law requires of them ordinary care, skill and foresight which is the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. While the rule is not very clearly expressed or defined by the above statement of it, nor very distinctly illustrated so far as shown by the reference of the course of heads of families in matters interesting to them, yet the principle intended to be stated is the true one,—that is that in case of accident or an emergency such as is presented in this case, a railroad company is bound to use such means as would suggest themselves to and be within the knowledge and capacity of well-informed and competent business men in such positions and such diligence as prudent, skillful men engaged in that kind of business might fairly be expected to use under like circumstances, and that this diligence and these means should be actively used to protect and secure the property confided to their care. In other words, there should be no failure to use actively and energetically all the known and usual means which may fairly be expected to be found within the knowledge of men of average qualifications engaged in a responsible business of this kind where large amounts of property of the citizens are passing through their hands and are entrusted to their care."

In the case of *McGraw* v. *R. R. Co.*, 18 W. Va., 361, it was held that if the goods transported were frozen, it exempted the carrier from liability, provided

he had been guilty of no previous negligence and misconduct by which such loss or damage may have been occasioned. In the opinion in that case at page 365 the court says: "But whenever the common carrier is exempt from liability, either because of an act of God *or because of the nature and inherent character of the property and its liability to loss or damage, he must be free from any previous negligence and misconduct by which that damage may have been occasioned, for though the immediate or proximate cause of a loss in any given instance may have been what is termed an act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused.*"

In the case of *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456, the court, in its opinion, said: "An act of God is "a cause which no human prudence or power could pre-"vent or avert. While it is true that no human agency "can prevent or stay an act of God, the act itself being "that of Omnipotence and irresistible, it is frequently "the case that the results or natural consequences of an "act of God, by the exercise of reasonable foresight and "prudence, may be foreseen and guarded against. When "this can be done by the exercise of reasonable diligence "and prudence, a failure to do so would be negligence "and subject the party on whom this duty devolved to "damages, although the original cause was an act of "God. *Notice of an extraordinary rise at the head of "a river might be sufficient to parties engaged in busi-"ness lower down to expect a proportionate rise and to "prepare for it, dependent more or less on the sudden-"ness of the rise and the time after notice and before the "rising water reached the place where the injury oc-"curred.*"

See also *Coosa River Steamboat Co.* v. *Barclay*, 30 Ala., 120, l. c., 127.

In this case defendant was bound to take notice from flood conditions in the Kaw river at Topeka, where defendant had its chief offices, as those conditions existed on Friday, May 30, when these cattle were forwarded from Strong City, that it was positively and unqualifiedly dangerous to attempt to take them across the Kaw river at Kansas City.

In the case of *Nugent* v. *Smith*, 1 C. P. Div., 19 and 423, l. c., 436, the court in an exhaustive opinion delivered by Cockburn, C. J., said: "The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care. In the other it is beyond his power to do so. If, by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy and hence perishes from the storm which it otherwise would have weathered, if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided, or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception."

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 595, the author uses the following language: "Where the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God; or, as it has been expressed, where the loss is caused by the act of God, if the negli-

gence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In Vol. 5, Am. & Eng. Law (2d Ed.), 234, the author uses the following language: "No accident or casualty which might have been prevented by the exercise of ordinary care and forethought on the part of the carrier and by the use of known means not requiring any extraordinary diligence, can be attributed to inevitable accident or act of God as a cause, and the carrier cannot escape liability therefor."

In Hutchison on Carriers, Sec. 181, the rule is stated thus: "And whenever the carrier is placed in a situation in which it becomes necessary for him to exercise his skill or judgment, no matter what may be the circumstances of danger or difficulty, he takes the risk of the proper exercise, and if there be a way or means of escape, *a carrier by losing his presence of mind* or by mistaking one object for another is thereby misled or shows a want of the necessary skill and judgment whereby a loss occurs, he is responsible." See also Hutchinson on Carriers, Secs. 185 to 192. In Hutchinson on Carriers, Sec. 186, it is said: *"And it may be stated generally that whenever he goes to meet danger in spite of the warning of the elements or with a blind confidence that he will be able to encounter it in safety, whether it be upon sea or on the land, he brings the loss upon himself and it will not avail him that the immediate cause of it was the act of God."*

In this case the telegrams read in evidence taken in connection with the evidence of Mr. Douthitt show that defendant's officers and agents wholly lost their presence of mind when they commenced the repeated acts of loading and unloading of the cattle at Strong City, and that they did not regain their presence of mind until the flood subsided.

In Hutchinson on Carriers, Secs. 187 an 188, the cases of the *Charleston S. B. Co.* v. *Bason*, 1 Harper, 262, and *Campbell* v. *Morse*, 2 Harper, 468, are cited by that author with approval. In the first case, where goods were laden upon a steamboat which grounded from the reflux of the tide, in consequence of which she fell over and the water rose into her cabin and injured goods belonging to the plaintiff, the owners of the vessel were held liable for the loss, because it was held that the master of the vessel was guilty of negligence in not selecting a proper place for the grounding of the vessel or in not removing the goods when he saw that the coming of the water into the cabin was inevitable under the circumstances in which the vessel was placed. He was, therefore, liable for two reasons: (1) because of his negligence in bringing the vessel into the improper place where the danger should have been seen, and (2) because when the grounding had occurred he did not use the proper diligence to save the goods. And in the other case, of *Campbell* v. *Morse*, the carrier undertook to cross a stream between sundown and dark, immediately after a rain, and the wheels of his wagon stuck fast and he was unable to extricate it before the stream rose so as to submerge the body of his wagon and damage the goods. He relied for his defense upon the nature and circumstances of the misfortune as an excuse, although it was proven that the rise was more sudden and higher *than any that had been known to take place in the stream for forty years.* The court held that it was manifest that had he gone through the ford without being stopped the accident would not have occurred. In attempting to cross the stream under the circumstances, he took upon himself the risk of its sudden rise and the consequences.

In this case defendant's officers and agents had no

right to estimate or guess that this flood would be of the same exact height as the flood of 1881, and that it would not go higher.

In Vol. 6, Cyc. Law & Proc., 377, it is said: "The term act of God used to express a cause of loss or damage, for the consequences of which the carrier will not be liable, means some casualty not due to human agency. The terms inevitable accident and unavoidable accident are sometimes used as synonymous with the act of God, but they lack the suggestion that the loss is due to other than human agency and therefore their use is not satisfactory. Indeed, it has been said that act of God is distinguishable from inevitable accident. In the civil law the carrier is said to be excused by *vis major* and also by *casus fortuitus*, but the rule of carriers' liability by the civil law is the same as by the common law, and these terms are not equivalent to act of God. To constitute act of God the casualty must be not only the direct result of natural causes, but one which is in no way contributed to by human agency."

Again, at page 384, the same author says: "It is clear from what has been already said that if the carrier might, by reasonable care or foresight, have avoided loss by act of God or other excepted cause, he will be liable. The duty also rests upon him as far as possible to avoid or lessen the damage resulting from such cause, and negligence in not doing so will render him liable."

In the case of *Strouss* v. *Ry. Co.*, 17 Fed. Rep., 209, l. c., 212, the court in its charge to the jury said: "You will see, then, from the statements of these general principles, that the important question for you to settle from the evidence is whether, after these trunks were received by the baggage master and checked, the flood came so suddenly that under the circumstances the injury could not have reasonably been prevented by the defendant, or its

agents in charge of the trunks, by the use of all possible means. If it could have been done with the exercise of reasonable and proper and all possible means that could be exercised and used by these officers, then the defendant was bound to place the trunks in a place of safety and prevent damage to the goods in the trunks. If, under the circumstances, it could not have been so reasonably and possibly done—with the surroundings of the parties at that time, from the impending flood— the sudden character of the flood—if they could not take care of the goods under these circumstances, then you will be justifiable in saying that they were injured by the act of God; but the theory of that is that the company must use every possible means to prevent the flood from damaging the goods. The general rule is that if goods in the hands of a common carrier are damaged by the public enemy—as in case of the army destroying goods at a depot in the late war—then the law says the common carrier is not to be held responsible for the loss of the goods. And so of sudden floods and cyclones, that render it beyond the power of the company to take care of the goods and protect them. And this question narrows itself down to the fact as to what care this defendant gave, under the circumstances, to these goods that night, in order to save them from injury, and what it did do. If, by the exercise of the means within its control, with all the surrounding as the depot was fixed (the plaintiffs put their trunks there in the depot as it was constructed), and you could not expect the railroad company to make any extraordinary provisions such as were only required on extraordinary occasions, but it would be required to use all the machinery it had around it to make this baggage secure—its officers did all that was possible to be done under the circumstances, then it is not liable; if they did not do that, then it is liable

to this plaintiff for the damages resulting from its failcre to carry these goods safely to Napoleon, and is only to be excused from the performance of this contract by the happening of an act of Providence that they could not avoid."

In the case of *Caldwell* v. *Southern Exp. Co.*, 4 Fed. Cas. No. 2303, p. 1083, decided by the Circuit Court of the U. S. for the Western District of Tennessee, it was held that the carrier is liable if he negligently expose property to capture by a public enemy, in consequence of which it is captured and destroyed. In that case it was held that if the negligence of the carrier concurred with the act of the public enemy the defendant was liable.

In the case of *Tompkins* v. *The Duchess of Ulster*, 24 Fed. Cas. No. 14078a, p. 32, the District Court of the U. S. for the Southern District of New York, in an opinion delivered by Judge Betts, held "that the act of God which excuses a common carrier from liability must be the immediate and distinct result of Providential events, *sudden or overwhelming in their character, which human sagacity of force could not foresee or prevent.*" In that case it appeared that a steamboat loaded in New York for Peekskill sunk in a storm in the North river. The case was one in admiralty. The libelant owners of the cargo proved by the pilot that there was fault and negligence in the management and equipment of the boat and it appeared that the boilers leaked and extinguished the fires, thus disabling the engines from working; also that an ash hole was left open below the deck. The claimants contended that the vessel and cargo were lost on account of the violence of the storm, and denied the allegations of negligence and improper equipment. The vessel was held liable by the court for the loss of the cargo. In the opinion in that case the court said: "In the aspect of the controversy it might be important to

examine particularly this branch of the case, because the rule of law seems explicitly settled that when the loss is produced wholly by natural causes, still if there be the least degree of negligence conducing to it or it arises in any way from human actions or neglect or in combination with such action or neglect, the carrier is not excused. *McArthur* v. *Sears*, 21 Wendell, 190. *Williams* v. *Grant*, 1 Conn., 487. * * * Yet usually the qualification attends that the accident or necessity which excuses a carrier must be the immediate and distinct result of Providential events, *sudden or overwhelming in their character, which human sagacity or force could not foresee or prevent. Forward* v. *Pittard*, v. *Durn.*, and E. 33, 3 Kent Comm., 217." The illustrations Chancellor Kent gives as the summary of the doctrine on this subject are that the carrier is responsible unless the loss has happened by means of lightning, earthquake or tempest.

In this case, as we have seen, the flood was no sudden affair coming like a fire or cyclone, but had been coming on for nearly a month before its climax was reached.

In the case of the *Southern Pacific Co.* v. *Schoer*, 52 C. C. A., 269, l. c. 274, 114 Fed. Rep., 466, the court adjudged that nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty and such as could not have been foreseen by the exercise of reasonable prudence or overcome by the exercise of reasonable care and diligence constitutes an act of God which will excuse the discharge of a duty." That was a case where the recovery was based upon damage sustained by the plaintiff in consequence of a collision of a train of the defendant. The railway company contended that the collision was due to an act of God. In the opinion of the court in that case by Judge Sanborn is the following language: "But there was nothing in

all this or in any of the evidence of the case to warrant an instruction to the jury that they might find that this collision was caused by an act of God, and nothing less than an act of God would relieve the defendant from the duty of exercising reasonable care in the operation of its trains. The foundation of the rule that the act of God excuses the faiulre to discharge a duty is the maxim *Lex neminem cogit ad impossibilia. If by the use of reasonable care, prudence and diligence under the circumstances of a particular case it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for the failure to perform it. Nothing less than such a fortuitous gathering of circumstances, preventing the performance of a duty, as could not have been foreseen or overcome by the exercise of reasonable prudence, care and diligence, constitutes an act of God which will excuse the discharge of the duty.*"

In the case of *Newport News Co. v. U. S.*, 9 C. C. A., 579, 61 Fed. Rep., 488, the court adjudged that under the Revised Statutes of the U. S., Secs. 4386, 4388, forbidding interstate carriers of animals to confine them more than twenty-eight consecutive hours without unloading for rest, water and feed, unless prevented by storm or other accidental causes, such unloading is excused by unavoidable causes only and therefore not by an accident to a train due to negligence. The language of the Act of Congress considered in that case, "unless prevented from so unloading by storm or other accidental causes," is the same, word for word, as the concluding words of the second paragraph of the contract in this case, which is recited in the opinion of the trial judge in his opinion in this case. In the opinion in that case of the Circuit Court of Appeals for the Sixth Circuit the following language is used: "Congress did not mean that simply because the carrier had encountered

the storm, therefore he must be excused. It must appear that the storm prevented obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If with all reasonable exertion a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably prevented from obeying the law. If, notwithstanding the storm he could, by due care, have complied with the law, then he is at fault because his own negligence is the last link in the chain of cause and effect, and in law the proximate cause of the failure to comply with the law. Therefore, to avail himself of the excuse of storm the carrier must show, not only the fact of a storm, but that with due care he was prevented as an unavoidable result of the storm from complying with the law. We may reach but one conclusion as to the meaning of Congress by the expression, "other accidental causes." If the storm is no excuse unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse unless that cause and its effect are likewise unavoidable. The meaning of the words "other accidental causes" must be ascertained by referring to the preceding special words.

The rule *noscitur a sociis* is clearly applicable. A storm is unavoidable in the sense that it cannot be prevented. Other accidental causes must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence."

In the case of *Clark* v. *Barnwell*, 12 Howard, 272, l. c., 280, this court in its opinion said: "And the main question in the case is whether or not the damage in question was occasioned by one of the perils and acci-

dents within this clause of the bill of lading, for the masters and owners, like other common carriers, may be answerable for their acts although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is not whether the loss happened by reason of negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law or the particular stipulations of the parties, affords an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading; but even where evidence has been thus given, bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. For then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is that although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable."

In the case of *Holliday* v. *Kennard*, 12 Wallace, 254, this court, in an opinion delivered by Mr. Justice Bradley, affirmed the rule that when goods in the hands of a carrier are threatened to be destroyed or seized by a public enemy, he is bound to use due diligence to prevent such destruction or seizure. It is not necessary that he should be guilty of fraud or collusion with the

enemy or willful negligence to make him liable. Ordinary negligence is sufficient. In the opinion in that case Mr. Justice Bradley said: "The effect of the charge as delivered was that although a common carrier is not responsible for the destruction or loss of the goods by the act of God or a public enemy, he is, nevertheless, bound to use due diligence to prevent such destruction or loss. *If his negligence or want of proper attention contributed thereto, he would be liable therefor.* * * * Surely the law requires this degree of diligence and would make the defendant liable for the want of it—that is, for ordinary negligence. Whether such negligence was or was not proved, was fairly left to the jury."

In the case of *Gleason* v. *Virginia Midland R. R. Co.*, 140 U. S., 435, l. c., 439, this court, in its opinion, used the following language: "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses have been held to be acts of God, but we know of no instance in which a rain of not unusual violence and the probable results thereof in softening the superficial earth have been so considered. In *Dorman* v. *Ames*, 12 Minn., 451, *it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary and reasonably to be anticipated at certain seasons of the year, and we think the same principle applies to this case.*" The recurrence of floods in May and June annually are to be anticipated in both the Missouri and Kaw rivers. But the flood of 1903 in the Kaw river, according to the testimony of both Messrs. Connor and Jennings, was far above the average annual floods from an early time in May, 1903, and its growth was continuous and unprecedented from the start.

In the case of *The Majestic*, 166 U. S., 376, l. c., 386, this court unanimously adjudged that the act of

God which would exempt from liability a common carrier is limited to causes in which no man has any agency whatever. In the opinion in that case the following language is used: "'The act of God,' said Chancellor Kent (Vol. 2, p. 597), 'means inevitable accident without the intervention of man and public enemies,' and again (Vol. 3, p. 216) that 'perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence.'" And *casus fortuitus* was defined in the civil law to be *quod damno fatali contuigit cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity. The words "perils of the sea" may, indeed, have grown to have a broader signification than the act of God, but that is unimportant here. Shipmen, in the Court of Appeals, quotes from 1 Parsons on Shipping, 255, the definition there given of the act of God, and the reason for it, as follows: "The act of God is limited, as we conceive, *to causes in which no man has any agency whatever, because it was intended never to raise in the case of the common carrier the dangerous and difficult question whether he actually had any agency in causing the loss, for if this were possible he should be held.*"

III.

Upon that branch of the case relating to the question of deviation we submit the following authorities:

In the case of *Crosby* v. *Fitch*, 12 Conn., 410, l. c., 419, 420-423, this question of deviation was discussed and decided. In that case the goods were consigned for shipment in defendant's vessel from New York City to Norwich, Conn., and the usual course of navigation vessels in such cases was by Long Island Sound. The navi-

gation of the sound being interrupted by ice, the vessel made the voyage south of Long Island, where a loss occurred by the goods being thrown overboard in a storm to save the vessel. The court held that the vessel should not have commenced its voyage until the ice had disappeared from the sound; that there was no sufficient necessity for the deviation, and that the owners of the vessel were liable for the loss of the goods. The court, at page 422, places the liability on the ground of contract, holding that the usual and customary route is within the contemplation of the parties when the contract of shipment is made.

On the subject of deviation, see also *Powers* v. *Davenport*, 7 Blackford, 497; *Philips* v. *Bingham*, 26 Ga., 617.

The above case of *Crosby* v. *Fitch*, 12 Conn., 410, and the cases of *Davis* v. *Garrett*, 6 Bing., 716; *Williams* v. *Grant*, 1 Conn., 487, and *Michaels* v. *R. R.*, 30 N. Y., 564, are approvingly cited by this court in the case of *Constable* v. *Natl. Steamship Co.*, 154 U. S., 66.

In the case of *R. R. Co.* v. *Beck*, 125 Pa. St., 620, the court adjudged that when a railroad company, in disregard of a shipper's instructions and of its undertaking, forwards merchandise by steamer instead of by rail, and the merchandise is lost by fire on the steamer, the carrier is responsible for the loss in an action on the cintract, the question of proximate cause as in an action for negligence being immaterial. In that case the court in its opinion says: "If the defendant company, for reasons of its own, saw fit to disregard instructions and forward the cigars by steamer instead of by rail, and a loss resulted, it is too plain for argument the defendant would be responsible for such loss. It is begging the question to say that if the cigars had been shipped by rail as directed a loss might have occurred. In such

case the defendant would have incurred no responsibility."

So in *Phillips* v. *Brigham*, 26 Ga., 617, it was held that "if a common carrier deviates from the regular route and the goods are lost, it is a conversion." In the opinion in that case the court said: *"If the boat took the cotton by agreement, to carry the cotton to Savannah, and instead of going the ordinary route to Savannah went an extraordinary route, and while out of the ordinary route the cotton was lost, that was a conversion."*

In this case the ordinary and usual route, according to all the evidence, for a shipment over defendant's road from Amarillo, Texas, to Atchison, Kansas, was by way of Wellington, Strong City, Emporia, Topeka and Valley Falls to Atchison, and the taking of the cattle from Emporia to Kansas City was a deviation by an extraordinary route not within the contemplation of the parties in making the shipment.

In the case of *R. R. Co.* v. *Cole*, 68 Ga., 623, it was held that "Where goods are delivered to the first of a connecting line of railroads to be shipped to a given destination by a specified route, a delivery by the first railroad to another railroad which forms a part of a different route *is a breach of the contract and a conversion* which renders the first road liable for the value of the goods, and if the goods be delayed by such delivery, or damage result, the first road may be held responsible therefor."

In this case the route within the contemplation of the parties, as evidenced by the endorsements on the back of the contracts of shipment and also on the way bills, was from Amarillo to Atchison over defendant's road, from Atchison to Council Bluffs over the Burlington route, and thence to Evarts, S. D., over the C., M. & St. P. Ry., and the attempt to transport the cattle over

Missouri Pacific railway by way of Kansas City was a conversion.

In the case of *Cassilay* v. *Young*, 4 B. Monroe, 265, the Appellate Court of Kentucky held that the undertaking of a carrier to deliver goods, the dangers of the river excepted, with privileges of reshipment at a particular point, will not authorize a stoppage short of the point designated for reshipment, and if the carrier stops short of that point and the cargo be lost in a storm, the carrier will be held responsible. The vessel of the defendants which carried the plaintiff's goods in that case was sunk in a storm at Paducah. The shipment was destined to Vicksburg, Miss. The court in its opinion in that case says: *"The storm at Paducah was undoubtedly a peril of the river or an act of God for the effects of which the carriers would not have been liable if they had encountered it in the ordinary course of their voyage and of their duty, but as it comes upon them when out of the course of their voyage and of their duty and might probably have been avoided or at least its effects greatly mitigated but for their disregard of their duty and of their contract, we are of opinion that they are liable for the loss."*

In the case of *Sager* v. *R. R. Co.*, 31 Me., 228, l. c., 238, the court held that "a common carrier will be liable for damage to goods resulting from disobedience of the directions given by the owner and assented to by the carrier respecting the mode of conveyance."

In the case of *R. R. Co.* v. *Washburn*, 22 O. St., 324, it was held that a common carrier who undertakes to transport goods over the whole or a part of its own route and then to forward them to a designated destination beyond is bound to transmit, with their delivery to the carrier next on the route, all special instructions received by him from the consignor, and in default there-

of in any material or substantive particular to stand responsible or to make good the loss to which such negligence shall have contributed. In that case a shipment was made from Cleveland, O., destined to Martinsburg, Mo. The shipment was delivered to the Cleveland, Columbus & Cincinnati R. R. Co., which was to carry the goods to St. Louis and deliver them to the North Missouri R. R. Co., on whose line said point of destination, Martinsburg, was situated. The receiving company carried the goods to Columbus, and there delivered the goods to the defendant, Miami R. R. Co. The line of the defendant railroad company composed a part of the line of the initial railroad company. The goods were carried to Cincinnati and were there diverted by being delivered to the Ohio & Mississippi R. R. Co., which did not constitute any part of the line of shipment originally designated, and the goods were consigned to C. A. Scott, a commission merchant at St. Louis. On the arrival of the goods at St. Louis Scott refused to pay the freight charges, and the goods were lost in St. Louis. In its opinion in that case the Ohio Supreme Court said: "A common carrier who receives goods under an agreement to transport them over the whole or a part of its own route, and then to forward them to a destination beyond acts in the two-fold capacity of carrier and forwarder. In the latter capacity alleged negligence in which is the sole ground of controversy presented by this record, he acts as agent of the consignor and as such is bound to transmit with reasonable exactness to the next succeeding carrier the instructions of his principal. If these instructions be without restriction as to the subsequent route, intermediate consignment or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of tran-

sit, with the like general instructions in terms sufficiently explicit and unambiguous to inform him of their ultimate destination."

In the case of *Express Co.* v. *Smith*, 33 O. St., 511, the Court there held as follows: "The carrier who undertakes to carry goods over his own road is not responsible for unavoidable delays such as might be occasioned by the destruction of a railroad bridge by a flood, and if such delays occur while the goods are in transit it is thereupon the duty of the carrier to exercise his sound discretion and reasonable diligence in forwarding the goods to their destination. He is not bound to divert the goods from his own to another road over which he has no control, unless in the exercise of such discretion and diligence it appears that a change in route would have prevented the loss attendant upon delay." In that case it was contended by the plaintiff that the injury to the goods while in transit near Utica, N. Y., by reason of heavy rains, could have been avoided if the goods had been transshipped and the shipment deviated either by way of Syracuse of Buffalo, and it was contended that, therefore, it was the duty of the carrier to make such deviation. The Court, at p. 520, respecting this contention, said: "Had the plan suggested been in fact pursued and the peaches transshipped either by way of Syracuse or Buffalo, the delay which would have ensued, together with the rough jolting attendant upon the necessary cartage, would, as it seems to us, have insured their entire destruction. Thereupon the shippers might, with much force of argument, have said: *'We shipped by your route and you had no right to make a deviation. By so doing you subjected our property to unusual delays and risks not contemplated, and loss having ensued, you are responsible. You should have gotten it around the break with all speed, but if that were impossible you*

should have sold it to the best advantage instead of taking a course which must have necessarily led to its entire loss.' "

In the case of *Brown and Haywood Co.* v. *The Pacific R. R. Co.*, 63 Minn., 546, it appeared that the defendent carrier had received the shipment of goods from the plaintiffs to be carried to a point beyond defendant's line, with directions from plaintiffs to deliver them to certain connecting carriers, to be carried to their destination. The shipper made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points on its line and certain portions of the goods delivered to each point; the balance to be carried to the destination to which the goods were billed by the initial carrier. The initial carrier had no knowledge of this agreement and wrongfully sent the goods by a disconnecting carrier, whose line did not reach the place of destination but did reach one of said intermediate points, to which it brought the goods and was proceeding to forward the whole of them to the place to which they were so billed, when plaintiff disclosed to it his contract to have the goods distributed to the three points, and demanded that it be complied with. Before complying with the same, this carrier compelled him then and there to pay the whole freight for the whole route and thereupon delivered him the goods destined to that point, and undertook at his own cost to carry to each of the other points the portion of goods destined to such point. In doing so one package of goods was broken and destroyed. In a suit by the shipper against the initial carrier for the loss, the Court held in that case the initial carrier became, by its wrongful act of diverting the goods from the designated route, an insurer for their safe delivery at the three places of destination, though two of those places were never dis-

closed to it. It was further held in that case that the transaction between the shipper and the carrier to whom the goods were wrongfully delivered did not amount to a delivery then and there to the shipper so as to relieve the initial carrier from his liability. There was a judgment in the trial court against defendant carrier, and on an appeal that judgment was affirmed. In the opinion in the case the Court says: "Appellant concedes that by misconducting the goods beyond the end of its own line the defendant was liable for conversion, and was therefore liable for the safe arrival of the goods at their destination, all of which is undoubtedly good law."

In the case of *Hedricks* v. *Steamship Co.*, 18 La. Ann, 353, the Court held that "where a party selects one ship in lieu of another, whereon to ship his goods, he cannot complain if they are lost, although his bill of lading was made out for that other."

In *Hastings* v. *Pepper*, 11 Pick., 41, it was held that "if a common carrier receives goods directed to be carried in a particular manner and position, he is bound to carry them in that manner and position, and if he carries them otherwise and they are lost or damaged the burden will be upon him to prove that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by the act of God or a public enemy or the act or fault of the owner himself. In the opinion which was delivered by Chief Justice Shaw it is said: "As the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carry goods of this description with safety and to direct how they shall be carried, and as the carrier has the right to fix his own rate for the carriage or to refuse altogether to take the goods with such directions, the Courts are all of the opinion that if the carrier accepts goods thus marked, he is bound to carry the

goods in the manner and position required by the notice. Here it is in evidence and not denied that the box was stowed in such a manner that the marked side was not kept up and consequently the large bottle which was broken by some cause on the passage after it was stowed and before its arrival, bore its weight on its side and not on its bottom, but it is argued that although this fact is evidence of both negligence and breach of contract, still if the loss was not the consequence of such negligence the defendant is not the more responsible on that account. This is no doubt correct, but we are clearly of the opinion that such negligence and breach of contract being proved, the defendant is bound to stand to the loss unless he can prove clearly that the loss was in no way attributable to that cause, or rather, to prove affirmatively and beyond reasonable doubt what was the cause of the loss and that such cause was not attributable in any degree to the negligent disregard of the notice on the box."

In the case of *Proctor* v. *R. R. Co.*, 105 Mass., 512, it appeared that the defendant railway company, whose road ended in Boston, received at a way-station goods addressed to St. Louis, which the defendant company agreed to convey to Boston and forward thence by the Merchants Express, which was a line of transportation from Boston to the West; but instead of delivering the goods to said Merchants Express at Boston, the defendant company forwarded the goods to New York by other carriers, who there delivered the goods to a company styled the Merchants Express & Transportation Co., which conveyed them thence to St. Louis at a cost greater than would have been the cost of their transportation thither by said Merchants Express, and the court held that the company was liable to the consignor of the goods for the difference in cost.

In the case of *Rwy. Co.* v. *Allison*, 59 Tex., 193, the court held that *"if a common carrier deviates from his route or forwards goods by different conveyances than those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any exemption in his behalf in the contract."* In that case the company, in receiving the freight, stipulated against responsibility for damage beyond its own line, but agreed to forward the goods through to Chicago in the cars in which they were loaded, and it was held that by changing the cars after they left the road of the company it assumed the risk of safe transportation of the goods, notwithstanding the stipulation against liability for damage beyond its own line. At page 198 the court, in its opinion, says: *"The exemption from liability is, however, available only where the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route or forwards the goods by different conveyances from those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any exceptions made in his behalf in the contract. Fatman* v. *Cincinnati R. R. Co.*, 2 Disney, 248; *Robinson* v. *Merchants Dispatch Co.*, 45 Iowa, 470. The contractor forwarded the melons in this case through from Galveston to Chicago on the cars in which they were loaded as an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agent, the connecting line, when the change occurred, for the company, and it became liable notwithstanding the stipulation against damage beyond its own terminus. A case in point is that of *Stewart* v. *Merchants Dispatch Co.*, 47 Ia., 229. There goods were delivered to a transportation company at Worcester, Mass., to be taken to Muscatine, Ia., through

without transfer in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transferred to a warehouse and consumed by fire the same day. It was held that the company were liable for the loss, notwithstanding the exemption."

In the case of *Johnson* v. *R. R. Co.*, 33 N. Y., 610, l. c., 611, the court adjudged that a common carrier in the shipment of goods is bound to obey the instructions of the shipper, and if he disregards instructions and the goods are lost, the carrier is liable for their value; that the disregard of instructions by the carrier is at his own risk. The goods sued for in that case were lost on the passage thereof to New York in a boat that was lost. The goods had been delivered to the railway company at Littlefalls, in Herkimer County, New York, to be transported by the railroad company to Albany and thence forwarded by the People's Line of steamboats to New York City. The railway company, however, did not, in accordance with the instructions, deliver the goods to the People's Line of steamboats at Albany, but delivered them to a line of towboats of another company running between Albany and New York. The court, in its opinion, says: "The defendant undertook to transport the flax to Albany and to forward it thence to New York by the People's Line of steamboats; on the refusal of that line to receive it the defendant's obligation as a carrier ceased, and if it incurred any further liability it was in the character of agent for the owner of the property. In the absence of instructions as to the mode of transportation from Albany, defendant owed no duty to plaintiff beyond the delivery of the property in the usual course of business to safe and responsible carriers for transmission to its destination. *Brown* v. *Dennison*,

2 Wendell, 593; *Van Santvoord* v. *St. John*, 6 Hill, 157. But when the forwarding agent is instructed as to the wishes of his principal and elects to disregard them, he is guilty of a plain breach of duty and when he sends goods in a mode prohibited by the owner he does it at his own risk and incurs the liability of an insurer."

In the case of *Goodrich* v. *Thompson*, 44 N. Y., 324, the court adjudged the following proposition: If any express company contracts to forward goods by a particular steamer, but in fact sends them by a different steamer, and they are lost, the company is liable for the loss. The fact that the specified vessel is withdrawn from the route so that the goods could not be shipped by her does not authorize them to forward by any other usual, customary and proper mode of conveyance. *It is their duty to notify the owner and await instructions.* Forwarding by another vessel being unauthorized, they are responsible for the consequences.

In the case of *Maghee* v. *R. R. Co.*, 45 N. Y., 514, the court adjudged the following to be the rule in this class of cases, namely: When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way or by a particular route, he is bound to obey such directions, and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer and cannot avail himself of any exception in the contract. In that case there was a judgment in the trial court for the railway company which, on appeal, was reversed by the Court of Appeals. There is a full consideration of the case in the opinion delivered by Judge Andrews, and also of the above proposition adjudged by the court in the case, with the citation of a number of authorities, commencing at page 522 of the opinion.

See also *Hinckley* v. *R. R. Co.*, 56 N. Y., 429.

In the case of *Keeney* v. *Rwy. Co.*, 47 N. Y., 525, the company contracted to transport a quantity of cattle from Goderich to Buffalo. The cattle were sent to Brantford, and there the cars containing them were detached and placed upon a side track, where they could neither be unloaded nor fed and watered, and were left for two or three days, and consequently some of the cattle died and others were injured. The court held that the above was not an act of negligence in the execution of the contract, but an entire and intentional abandonment of all effort to perform the contract for the time, thus constituting a breach of contract, and the defendant was liable.

In the case of *Robertson* v. *National S. S. Co.*, 14 N. Y. Sup., 313, it appeared that the defendant carrier by its bill of lading acknowledging receipt of a quantity of goat skins in good order, agreed to forward them from Havre, France, by a certain steamer to London, to be there transported upon another steamer to New York. Defendant shipped the goods from Havre to Southampton and thence by rail to London, and the court held that this was a deviation from the terms of the contract, which made defendant liable as insurer for damages to the skins from their becoming wet and slimy before their arrival at London, although the cause thereof did not appear, and that the express terms of the contract could not be varied by any usage among shipping men as to routes. The court, in its opinion in that case, used the following language: "The bill of lading expressly provides that the carrier shall not be liable for damage from sweating, inherent deterioration, rain, spray or perils of the sea. From the evidence it is clear the defendant is not liable unless it be for deviating from the terms of the contract in shipping goods to Southampton and sending them from thence by rail to London, instead of for-

warding them by the steamer Wolf direct to London, as provided by the bill of lading. If it was clear that the damage to the skins resulted from their own inherent characteristics and that deviation had nothing whatever to do with their subsequent impaired condition, the deviation might be regarded as of no consequence; but it is impossible to hold that the deviation may not have led to the wet and slimy condition of the skins which was discovered when they arrived at London. *It is not for the court to determine whether the usual and customary route or one prescribed by the consignor is best suited to obtain safety and dispatch. The consignor may select his own mode of conveyance and has a right to require that the contract be fulfilled in the manner agreed. Dunseth* v. *Wade,* 2 Scam., 285. *If it is not so fulfilled the carrier takes all the chances and assumes all the risks, and this is precisely the position in which the defendant placed itself by the deviation aforesaid. How or from what cause the skins became wet and slimy as discovered at London, does not appear. Whether they would have fared different if they had been forwarded by the Wolf direct to London, is left to conjecture. The risk of this cannot be put upon the plaintiff, for defendant took the chances and must now bear the loss.* The contract was to carry the skins to London by the Wolf. This meant direct to London by water and without changes. If that was possible—and it was—the consignor was entitled to have his goods forwarded as he directed, and the failure of the defendant to perform its contract in this regard made it an insurer and responsible for the loss. Hutchinson on Carriers, Sec. 314. The rule is that if a carrier attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his

behalf in the contract. Lawson on Contracts, p. 122. *Maghee* v. *R. R. Co.*, 45 N. Y., 514."

In the case of *Seavey Co.* v. *Union Transit Co.*, 106 Wis., 394, it appeared that a railway company received goods consigned to the plaintiff at West Superior, upon a bill of lading providing for their transportation over the company's road in care of a certain steamship company at Buffalo, from which point to West Superior the latter operated a regular line of boats. At Buffalo the railway company delivered the goods to a different steamship company, the defendant, which ran a line of boats to West Superior and Duluth, and which contracted to transport the goods to West Superior on a specified vessel. Defendant had no notice or knowledge of the original transportation contract. For its own convenience the defendant transferred the goods at Duluth to a railway company to be carried to West Superior, and while in possession of such railway the goods were damaged. It was held by the Wisconsin Supreme Court (1) that, except as it constituted the first carrier a forwarding agent, the original bill of lading has no force as between plaintiff and defendant, and its provisions as to the responsibility of an intermediate and forwarding carrier are irrelevant; (2) the delivery to another carrier at Duluth was a breach of defendant's contract, and rendered it liable as an insurer for any injury or loss that would not have occurred had it performed its duty."

In the case of *Ry. Co.* v. *Brichetto*, 72 Miss., 891, it was held that a railroad company having transported vegetables consigned to a northern market to the junction of its road with another road in the same system, and finding that because of a strike they could not be forwarded over that road, instead of sending them by another available route, *without communicating with the shipper, as could easily be done*, diverts them to a south-

ern market where they are sold at a sacrifice, is liable in damages. In that case the railway company had a contract of carriage of the plaintiff's vegetables from Edwards, Miss., to Cincinnati, O. On the freight reaching Meridian, where the goods were to be delivered to the Alabama Great Southern Railroad, called the connecting link, but really a link in the same system of which appellant was a part, it was found impossible to forward the freight over that road by reason of a strike. On these facts the court, in its opinion, says: *"It was the duty of appellant in this unforeseen emergency to communicate with the shipper, if convenient, and take his directions. It was altogether practicable to have notified the shipper in a few minutes, and to have taken his advice, but this the appellant failed to do."*

In this case Mr. Frost, who is one of the plaintiffs, accompanied the shipment on defendant's cars as the representatives of all the plaintiffs, and was never consulted with reference to defendant's movements of their cattle. (Record, pp. 37, 39, 40, 41, 195.)

In the case of *R. R.* v. *Odil*, 96 Tenn., 61, the court there held: A common carrier cannot justify a deviation *en route* upon refusal of a connecting carrier to receive freight on account of a strike, without notice to the shipper and instructions from him, where it appears that the goods could have been held and properly cared for without injuring their safety until such notice had been given and instructions received. It was also held by the court in the case that "A common carrier who unjustifiably substitutes another connecting carrier for the one named in the bill of lading, becomes insurer for the substituted carrier, and is liable for the loss of the goods while in the latter's possession, even by inevitable casualties." The facts of that case as appears from the opinion of the court were as follows: The potatoes of the

plaintiff were shipped from Nashville, Tenn., destined to Chicago. The bill of lading, as well as the proof, showed that the potatoes were routed to go by the Louisville & Nashville Railroad Co. to Evansville, Ind., and from there by the Evansville & Terre Haute Railroad and into Chicago over the Chicago & Eastern Illinois Railroad. When the potatoes reached Evansville they were tendered to the Evansville & Terre Haute Railroad immediately upon their arrival, but that road declined to take them on account of a strike then prevailing on the Chicago & Eastern Illinois Railroad. Thereupon the Louisville & Nashville Railroad Co. delivered the potatoes to the Peoria, Decatur & Evansville Railroad, which had a line into Chicago connecting with the Wabash Railroad at Sullivan, and running into the city over that road. This road at that time was open to Chicago and was as well equipped and as expeditious as the road over which plaintiff had routed the potatoes, and was in no sense inferior. After the potatoes had been delivered to that road and had started upon their transit the strike spread to the Wabash road, and that road refused to receive the potatoes on their arrival at Sullivan, the junction point. The potatoes were thereupon taken back to Peoria and placed in the hands of a warehouse man and sold for the railroad upon the idea and belief that being perishable this disposition was the best for the shipper and other persons concerned. No notice was given to the plaintiff that the Evansville & Terre Haute Railroad had refused to receive the potatoes at Evansville, or that they had been sent over the Peoria road, or that they had been diverted to and sold at Peoria. Plaintiff refused to accept the proceeds of the sale. Based on these facts the court in its opinion, says: "It is insisted in the assignment of errors that under the facts in this case an emergency had arisen which justified a deviation in route, inasmuch as

the one chosen by the shipper was closed by a strike and the other equally good was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands a deviation from the route agreed upon with the shipper, it may be made and will be justifiable, as, for instance, forwarding perishable freight by rail when a storm prevents a boat from proceeding upon its voyage; *but where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him.* Ray on Freight Carriers, Sec. 1. Hutchinson on Carriers, Sec. 14. See also *R. R.* v. *Campbell*, 7 Heisk., 261. *Unless justified by urgent circumstances a deviation by the carrier will render it responsible for losses resulting even from inevitable casualties, and the original carrier becomes in effect an insurer for the line he selects.* Ray on Freight Carriers, Sec. 79. Hutchinson on Carriers, Sec. 314. *It clearly appears in this case that the plaintiffs could have easily been consulted by letter or wire and their instructions taken, when it was found that the route selected was closed at Evansville, and the shipment safely held in the meantime; and failing to do this, the defendant road must be held to be liable for any injury resulting from the substituted route."*

The case of *Merchants' Dispatch Tr. Co.* v. *Kahn*, 76 Ill., 520, illustrates the principle of liability in cases of deviation in transit. In that case the goods were shipped from Worcester, Mass., for Matoon, Ill., as the point of destination, and the usual course of carriage and transit was by way of Indianapolis and not by way of Chicago, but in that case the carrier took the goods to Chicago and stored them in a warehouse, where they were destroyed by the great Chicago fire; the court held on those facts that the carrier was liable for the loss.

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 594. the author uses the following language: "Thus it has been held that although a hard frost may be considered an act of God, yet damages to goods on board a steam vessel by the leaking of a pipe which was burst by the frost is a loss for which the carrier may be held liable, and if a cargo is injured by a storm at sea during a deviation from the usual course by the master of the vessel, it has been maintained that the deviation is a sufficient proximate cause of the loss to enable the freighter to recover."

In Vol. 5, Am. & Eng. Enc. Law (2d Ed.), 422, 426, the author on this subject of deviation says: "The carrier is liable for any loss occurring in the course of a deviation from its proper route or from the instructions of the shipper as to other matters, no matter from what immediate cause the loss may arise. It has been urged with much force that the very fact of a deviation ought not to affect the carrier's liability unless it be shown further that such fact contributed in a direct way to cause the loss, *but the rule has been strictly adhered to that the shipper is bound only to prove a deviation and the loss in the course of it; upon such proof the carrier is liable unless it can be clearly shown that the loss would have occurred had there been no deviation. * * * In cases of emergencies which justify a deviation and when the owner's consent might fairly be presumed, the carrier may act in contradiction or modification of the letter of his instructions, but in all such cases should give notice to the owner, as soon as practicable, of what has been done.*"

In Hutchinson on Carriers, Secs. 190, 191, the subject of the liability of the carrier in cases of deviation is fully stated. In Section 190 of that work the author says: "*So if the carrier deviate without necessity from*

the regular and usual course, he will be held responsible for any loss which may occur, whether by the act of God or from any other source, and it will not be competent for him to show that had he gone the usual and customary route he would, in all probability, have encountered the same danger with the same consequences, nor would it avail him that had he done so the same misfortune would beyond a reasonable doubt have overtaken him."

In Lawson on Bailments, Sec. 127, the rule in cases of deviation is stated thus: "Loss by act of God after deviation. Deviation is the voluntary departure from the voyage or route without necessity or reasonable cause. Necessity can alone sanction it in any case, and then it must be strictly commensurate with the *vis major* producing it. *If a master deviates from the usual course of his voyage and damage is caused by a tempest in itself the act of God, the proximate cause of the loss is the wrongful act of the master, and he is responsible for it. The same rule applies to carriers by land.* If the carrier has agreed to send goods by land and he sends them by water, or if he has agreed to carry them by canal and he takes them out to sea, and they are lost by an act of God, he is liable. So, if he agrees to send them by one line of boats and sends them by another, or if he agrees to send them by steam and he sends them by sail, the burden of showing a necessity for the deviation rests upon the carrier, and the necessity must be real and not merely apparent. If the deviation is one for the convenience of the carrier, he assumes the risk for any loss that may occur and becomes an insurer at all events."

In 6 Cyc. Law & Proc., 383, 384, the author uses the following language: "If the carrier, in transporting the goods, unnecessarily deviates from the usual and

ordinary route contemplated in the undertaking, he will be liable for any loss occurring during such deviation, although such loss is within the recognized exception to the carrier's liability. Indeed, it is said that in departing from the established route the carrier is guilty of misfeasance and is liable for the value of the goods on the theory of conversion. The carrier is equally liable where, having expressly contracted for a particular route, mode or manner of transportation, he transports goods otherwise than as stipulated and they are lost or damaged. Thus if the carrier leaves goods at a point short of their destination he becomes absolutely liable for loss or injury. It may become necessary for the carrier, by reason of some emergency not contemplated at the time of shipment, to change the route or method of transportation, and, if so, he will not be liable for subsequent loss or injury for which he is in general not responsible by law or contract, but if it is practicable in such case without risk to the goods, to notify the shipper, the carrier should do so rather than to depart from the terms of the contract, and await further directions. There is some uncertainty as to whether, when a deviation from the usual or stipulated route or method of transportation is shown, the carrier may excuse himself by proof that subsequent loss or damage, for which he would not but for the deviation have been liable, would have occurred had there been no deviation, but at any rate it is incumbent on the carrier to clearly and satisfactorily establish that fact, which usually he will be unable to do."

In the case of *Marsh* v. *Union Pacific R. R. Co.*, 9 Fed. Rep., 873, the United States Circuit Court for the District of Colorado held that when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money.

In the case of *Ins. Co.* v. *LeRoy*, 7 Cranch., 26, this court passed on this question of deviation in an insurance case. In the opinion in that case the court said: "The discharge of the underwritetrs from their liability in such cases depends, not upon any supposed increase of risk, but wholly on a departure of the insured from the contract of insurance. The consequences of such violation of contract are immaterial as to its legal effect as it is *per se* a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation. Necessity alone can sanction a deviation in any case, and that deviation must be strictly commensurate with the *vis major* producing it."

In the case of *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40, this court, in its opinion, said: "A deviation is defined to be a voluntary departure without necessity or reasonable cause from the regular and usual course of a voyage in reference to the terms of a policy of marine insurance, but it is no deviation in respect to such a voyage to touch and stay at a port out of its course if such departure is within the usage of the trade." In the case at bar the question of usage does not arise, because there is neither evidence nor pretense of any usage that shipments of cattle from Texas to Atchison may be deviated away from the main line across the Kaw at Topeka to Kansas City.

In the case of Constable v. *Steamship Co.*, 154 U. S., l. c., 61, *this court, in its opinion, says: "In the law we may deem a deviation as defined to be a voluntary departure without necessity or any reasonable cause from the regular and usual course of the ship insured.* 1 Bouv. Law Dict., 417. *Hostetter* v. *Park*, 137 U. S., 30, 40. *Davis* v. *Garrett*, 6 Bing., 716. *Williams* v. *Grant*, 1 Conn., 487. *As for instance, where a ship bound from New York to Norwich, Conn., went outside*

of Long Island and lost her in a storm. Crosby v. *Fitch,* 12 Conn., 410. *Or where a carrier is guilty of unnecessary delay in pursuing a voyage or in the transportation of goods by rail. Michaels* v. *N. Y. Central R. R.,* 30 N. Y., 564.

In *Express Co.* v. *Kountze Bros.,* 8 Wall., 342, the express company received from defendants in error a quantity of gold dust for transportation from Omaha to Philadelphia, and in its receipt stipulated that it should not be liable "for any loss or damage by fire, the acts of God, or the enemies of the government, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war." There were two routes over which the property might be sent; one through the state of Iowa and the other by way of St. Joseph, and by railroad across the state of Missouri. The former was the safest by reason of the disturbed conditions of Missouri on account of the war then in progress; the latter route was the more expeditious, though the more hazardous. Plaintiffs, so one of them testified, notified the company's agent not to send the gold dust by the St. Joseph route. The company, nevertheless, did so, and the gold dust was lost by robbery while in transit through Missouri. The court said (p. 353): "If this testimony be true, it is hard to conceive a case of grosser negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in definance of the wishes of the owner of the property, rejected the safe and adopted the hazardous route. *Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation whenever practicable."* Judgment against the express company was affirmed.

In *L. & N. R. R.* v. *Duncan,* 34 So., 988, s. c. 137

Ala, 446, a car of mules were delivered to the railroad company for transportation from Birmingham, Alabama, via Montgomery, and thence over the Plant system to Greenville, Florida. No one for the shippers accompanied the shipment. On arrival at Montgomery the Plant system refused to take the shipment, and the company, without communicating with the owners, forwarded the car by another and much longer route, whereby the owners claimed damages to the shipment. Judgment for the plaintiffs was reversed and the cause remanded for a new trial, not because there was no case, but because of the insufficiency of the petition, but the court said (p. 990): "On the state of facts existing with reference to this consignment, after the car had reached Montgomery, and the Plant system had refused to accept it for carriage to Greenville, * * * *it was defendant's duty to give notice of that fact to the consignors, to the end that they might give further directions as to routing the consignment, unless the property was of such perishable nature as that the time necessary to give such notice and to receive such instructions would have caused a delay in forwarding calculated to injure or destroy it.* * * * *Live stock is, of course, perishable in a general sense; but we apprehend that horses and mules released from the car and in a pen at Montgomery, as these were, were in no danger of perishing while the defendant was communicating with the consignors at Birmingham, and receiving their reply.* It seems clear to us, also, that the parol evidence as to the consignors having given direction for the consignment to go from Montgomery by the Plant system, did not tend to vary or contradict the stipulations of the bill of lading, and that the evidence received on this subject, if believed by the jury, established the fact that the consignors directed the transportation to be over the Plant system."

In *Gulf C. & S. F. Ry.* v. *Irvine,* 73 S. W., 540 (Tex. Civ. App.), the court said: "The facts in this case show that appellees demanded that their cattle be shipped over appellant's line from San Angelo, Texas, to Brownwood, Texas, and thence over the line of the Fort Worth & Rio Grande Railway. This the appellant refused to do, and routed the cattle over its line by way of Temple and Cleburne, a distance of 115 miles further than by the route desired by appellees. The shipper usually has a right to select the route over which his goods are to be shipped, *and the carrier will be held liable for all damages resulting from a deviation from the route selected by the shipper.*"

On this point, as to deviation of the shipment without the consent of the shipper, the decision of the supreme court of Texas delivered May 15th, 1907, in *Texas & Pacific R. R. Co., et al.* v. *Easton & Knox,* 102 S. W. Reporter, p. 105, is recent, and as we conceive, authoritative. In that case the shippers, Easton & Knox, sought to ship cattle from a point in Texas to Tulsa, in the Indian Territory and informed the agent of the initial carrier that he wished the shipment made via Fort Worth, Texas. The contracts were written out routing the property via Paris, Texas, to which the shipper objected; and on being informed that the shipment could not be routed otherwise than via Paris, he signed those contracts.

On the trial, it developed that the agent's statement was not true; that they could have been routed via Fort Worth and also via Sherman, Texas, and the trial court found, under the facts which are more fully stated in the appeal of the same case, reported in 92 S. W., 832, 15 Tex. Ct. Rep., 642, that those contracts were obtained by duress and deception, and held them invalid and considered the case from the standpoint of the shipper's

desire and direction to the carrier to route the shipment via Fort Worth. The question of the legal effect of the deviation of the shipment by the carrier was distinctly raised in that case as it is in this, with this difference; that in this case there was no question between the shipper and carrier as to the route and there is no question of fact here as to the admitted deviation from the route contemplated by the parties. The court says (page 106):

"It is elementary law that if a carrier deviates from the route fixed by his contract, he becomes responsible for all loss which occurs either on his own or his connecting lines. By the deviation, he becomes an insurer of the goods. It is also settled that when goods are delivered to a carrier for transportation to a designated point, it is his duty as a general rule, to transport them by the safest and most direct route. If being instructed as to the route he selects a different one, he becomes responsible for any loss that may occur in transit."

On page 107 of the opinion, and referring to other assignments of error, wherein the railroad company contended that the court below had made findings unsupported by the facts, the immateriality of those questions is disposed of as follows:

"As already intimated, we are of the opinion that by refusing to ship the cattle as directed by the plaintiff, the Texas & Pacific Railroad Company became responsible for all damages which accrued from the shipment."

It appears from the case that the most of the injury to the cattle occurred while they were in the custody of the St. Louis & San Francisco Railroad Company, the connecting carrier, to which they were delivered by the initial carrier, and that the initial carrier asked and obtained in the proceedings, a judgment over in its favor against the St. Louis & San Francisco Railroad Company of which the latter road complained. Both roads had

been sued in the case. On this point the court again says:

"The St. Louis & San Francisco Railway Company were responsible to the plaintiff for all damages which occurred to their cattle by reason of its negligence, while in its hands, notwithstanding the liability of the initial carrier for the same loss. The Texas & Pacific Railway Company having become an insurer of the cattle after they were delivered to its connecting carrier, when it was adjudged to pay for the negligence of the latter, it was subrogated to the rights of the plaintiff, and had the right to be reinbursed for what it was required to pay on account of the negligent conduct of the St. Louis & San Francisco Railway Company."

In this connection we again call the court's attention, as we have heretofore done, to the fact that neither the trial court in this case nor the court of appeals in its opinion, considered or decided the question of the legal effect of the railroad company's action in deviating the cattle to Kansas City without the consent of the shipper, from the contract route of shipment. In both courts we sought to collate and present all of the decisions on this question of law. In both courts we urged the importance and conclusiveness of this question; in both courts we emphasized and called attention repeatedly to the fact that plaintiff's asserted the liability of the railroad company, first, on the ground that it became absolutely liable for what happened to the shipments after their deviation from the regular contract route; and second, and independently, for the damage resulting from the various negligent acts of the defendant railroad company, which are assigned in the pleadings.

Neither court considered the question of deviation; the trial court in its opinion herein cited (135 Fed., p. 142), merely refers to it by saying he had no doubt of the right of the railroad company, under the circum-

stances, to make the deviation; the court of appeals, in its opinion, does not refer to the question at all.

If we are right in the position we have all along taken as to the law of the deviation of shipments by a common carrier, even the question of practice on which the court of appeals divided, and to which alone the majority and minority opinion are directed, would be entirely immaterial for the reason that it does appear from an examination of all the authorities, that under the undisputed facts in this record, the defendant railroad company is absolutely liable to these plaintiffs, by reason alone of the deviation of the shipment.

IV.

We submit, in conclusion, that the defendant should by this court be held liable to plaintiffs for their demand herein, both on the grounds of deviation and negligence and that the judgments of both courts of appeal and circuit court should be reversed, and the cause remanded to the trial court with directions to grant a new trial.

Respectfully submitted,

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THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner*,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 179.

STATEMENT.

As shown by the petition (Rec., 5-11) this is an action to recover the sum of $42,621.37 damages alleged to have been suffered by the plaintiff by reason of the defendant's wrongful conduct and negligence as a common carrier for hire, of freight, consisting of three train loads of live stock belonging to the plaintiff, two trains being shipped from Kenna in the Territory of New Mexico, and one from Bovina, in the State of Texas, all to be transported over the line of the defendant's railroad to Atchison, Kansas, thence by the Kansas City, St. Joseph & Council Bluffs, or Burlington route, to Council Bluffs, Iowa, thence by the Chicago, Milwaukee & St. Paul Railroad to Evarts, South Dakota. The allegations of the petition are substantially identical with those contained in the petition filed in the preceding case. The essential specifications of the respects in which the defendant was guilty of wrongful and negligent conduct and violation of its duty as a common carrier, whereby plaintiff's loss was sustained, are the same in both cases. Briefly the history of the movement of the three train loads of cattle in controversy in this case is as follows:

Stuebe (Rec., 385, *et seq.*) testifies: The cattle were bought in Texas by the plaintiff Cattle Company about

April 20, 1903. The first train load, of 21 cars, left Kenna, New Mexico, by the Pecos Valley Railroad Monday, May 25, between five and six o'clock p. m. The second train load left Kenna, Tuesday, the 26th of May, between six and seven o'clock p. m. and consisted of 22 cars, 3 cars of which train were dropped at Amarillo, Texas, and the train went on with 19 cars. The third train load, from Bovina, Texas, consisting of 17 cars, picked up the 3 cars at Amarillo, making 20 cars in that train. This train left Bovina, Texas, between nine and ten o'clock p. m., Tuesday, May 26th. The three train loads comprised 2293 head of cattle. Both Kenna trains were ahead of the third train from Bovina, which was personally accompanied by the witness Stuebe, who was personally interested in the plaintiff Company and its representative. The other two trains were also accompanied by representatives of plaintiff, the owner. The Bovina, or third train, reached Wellington, Kansas, between six and seven o'clock p. m. Wednesday, May 27th, and the cattle were there unloaded and fed. This train left Wellington between seven and eight o'clock a. m., Friday, May 29th, having been held there by the defendant about 36 hours. Its next stop was at the Kansas City Stock Yards, where it arrived between six and seven o'clock a. m. Saturday, May 30th. The first train from Kenna, which had started from that station, as stated, Monday, May 25th, between five and six o'clock p. m. and the train load of the Empire State Cattle Company, in controversy in the preceding case, arrived at Kansas City at the same time, Saturday morning, May 30th. The second Kenna train, which started from Kenna, as stated, the evening of May 26th arrived in Kansas City Friday evening, May 29th (p. 387). This train started 24 hours later from the point of shipment, and arrived at Kansas City 12 hours sooner than the first Kenna train.

Witness Welsh, plaintiff's ranch foreman (p. 348), had charge of and accompanied the first train shipped from Kenna on Monday, May 25th. His first stop was made also at Wellington on the evening of the 26th, between ten and eleven o'clock. He requested to be loaded out next morning at five o'clock, the 27th, but was not loaded out until the evening of the 27th about seven o'clock. The train ran that night to the first station beyond Strong City and then was taken back to Strong City and unloaded there about daylight on Thursday, the 28th. It also was detained at Strong City all of the 28th, and was re-loaded Friday morning, the 29th, leaving Strong City about noon on that day, and arrived at Kansas City, as stated, Saturday morning, May 30th (p. 349). This witness states that the 20 cars in his train got all necessary feed at Wellington, Kansas, but only got one bale to the car at Strong City. He saw Mr. Frost, of the Empire State Cattle Company and both the trains of that company at Strong City. In other words this train of cattle and the train of the Empire State Cattle Company, which was in charge of the witness Cloyd (Rec., preceding case, p. 31), which went on to its destination and missed the flood, and the train in charge of Frost in controversy in the companion case, were all three at Strong City at the same time. The train in charge of Cloyd was sent on and reached its destination in safety, the two trains in charge of Frost, for the Empire State Cattle Company, and Welsh for the Minnesota & Dakota Cattle Company, were not sent on from Strong City until about noon on Friday, the 29th, when they were hauled as one train to Kansas City, reaching there, as stated, Saturday morning, the 30th. The train load belonging to this plaintiff, which arrived at Kansas City Friday night, and the two train loads belonging to this plaintiff and the one train load belonging to the

Empire State Cattle Company, which arrived Saturday morning, were all unloaded in the Kansas City Stock Yards and placed in what is known as the Shipping Division of the Yards. From that time on, the history of the cattle belonging to both plaintiffs in these cases, is identical. The statement in the preceeding case, of the history of the flood of 1903 in the Kaw River, the details there given of the conduct and misconduct of the defendant in the movement of these cattle, it is unnecessary here to repeat. The acts and omissions, on the part of the defendant, complained of, are precisely the same, and everything in that regard that is there said applies with equal potency in both cases. About one fact, which we regard as of vital importance, there can be no doubt, and that is, all of these trains were originally routed from their respective stations of shipment by way of Amarillo, Texas, thence by the defendant's main line to Atchison, and thence by the Burlington north. The court in its opinion says, as to this fact (p. 647): "The way-bills upon which the cattle were shipped, and other evidence, discloses that the cattle were, by the initial carrier, routed over its line to Amarillo, Texas, thence over the defendant's line of road, by way of Wellington, Strong City and Topeka, to Atchison, Kansas, thence over the Burlington road to Council Bluffs, Iowa, and from thence to point of destination over the Milwaukee railroad."

In addition to the way-bills (p. 125) sustaining this statement of fact as to the original routing of the cattle, the shipping contracts attached to defendant's answer in both cases, although the court says that they themselves did not specify the route, show by their endorsements (p. 19) of "Kenna, N. M., to Atchison, Kan." and "Bovina, Tex., to Atchison, Ks." what the route was; and the bond attached as an exhibit to defendant's answer in this case (p. 19), on which defendant grounded a cross

action for the recovery of the expenses incurred at Kansas City and in the subsequent pasturage of the cattle, taken and accepted by the defendant July 9, 1903, recites that this plaintiff shipped the three train loads of cattle mentioned, "all of said shipments to be transported over the line of the Atchison, Topeka & Santa Fe Railway Company, or its connections, as shown by the stock contract, to Atchison, Kansas, and thence forwarded to Evarts, South Dakota, the point of destination." Whatever, therefore, the legal effect of defendant's act in bringing these cattle to Kansas City, the unquestionable fact is that it deviated the shipments from the line of transportation selected and determined between the parties at the time the shipments were made, and of their own motion and without the consent of the plaintiff, or its representatives in charge of the cattle, and without consultation with them or any of them, hauled the cattle to Kansas City and unloaded them off of the main line at a point where it was never contemplated they should be. Nearly all of the facts alleged in the petition in regard to the negligence of defendant are, as the court in its opinion says (p. 645) practically undisputed. It is practically undisputed that these cattle were detained by the defendant company at Strong City and Wellington for a length of time more than sufficient for them to have been fed and watered and safely transported to Atchison before the flood interrupted traffic on defendant's main line. The last train, according to the testimony heretofore cited, crossed the Kaw River at Topeka on Friday morning, the 29th of May, and reached Atchison safely. One train load of the Empire State Cattle Company's cattle which was, as stated, at Strong City at the same time that part of the plaintiff's cattle and the remaining train of the Empire State Cattle Company were there and ready to be shipped, went through to its destination in safety. Indeed, the court says (p. 652):

"It is true that if this delay had not occurred and the cattle had been promptly forwarded to and through Kansas City (Atchison?) they would not have been caught in the flood at Kansas City."

We, therefore, take the fact of the negligent and unnecessary delay on the part of the defendant as being established. It is an undisputed fact, also, that these cattle were in a safe place until they were brought into the Kaw valley and placed in the Kansas City Stock Yards near the mouth of that river, and at the lowest point in the valley. And again the court says (p. 652): "If they had been kept at such points until the flood had subsided they would not have been injured as they were at Kansas City."

The Court's attention has already been extensively called to the history of the flood and the situation of the defendant's railroad, and of its officers who directed and manipulated the movement of these trains. For brevity, and because the graphic delineation of that situation can not be improved, we will not attempt to go over it in detail. The fact that the flood conditions in the Kaw River and its tributaries began some time prior to the defendant's receipt of these cattle for transportation; the fact that that stream had, for weeks before the climax of the flood, been constantly rising; the fact that the defendant's General Offices were located at Topeka and its officers managing the traffic of its road were in constant and intimate touch with the situation; the fact that when Superintendent Hurley assumed the responsibility of ordering these train loads of cattle to come forward to Kansas City on Friday, May 29th, he knew at that time that defendant's line from Topeka to Kansas City, and from Topeka to Atchison, was impassable; the fact that he knew at that time that his order could not even be obeyed without hauling the trains by way of Olathe over the

Frisco tracks;—all these facts are practically undisputed.

The cattle having arrived in Kansas City, and being placed in the pens of the Shipping Division, the defendant did nothing toward getting them out to a place of safety. Kendrick, Live Stock Agent of the Burlington (p. 283), was ready to take the cattle out before any of them had arrived, and on Friday afternoon he went to the Santa Fe office to arrange to take the cattle out, but was told they were routed by the Missouri Pacific.

A rough sketch of the situation of the Stock Yards, with reference to the Kaw River, will be found on page 235 of the record. The office, at that time, of defendant's local Live Stock Agent was at Argentine. When Kendrick went to the defendant's office in the Exchange Building to arrange about taking the cattle out, the person in charge, at his request, confirmed by 'phone from the Argentine office, his statement that the cattle were routed by the Missouri Pacific. Kendrick, it seems, was even then afraid to credit the statement that his road was not to take the cattle, and satisfied himself by speaking to defendant's Argentine office over the 'phone, and in that conversation he was told the same thing. (p. 286). The Burlington had plenty of cars and equipment. Its loading chutes were in the south end of the Stock Yards just opposite the pens marked "Shipping Division," where the cattle were located, and south of the Exchange Building. These loading chutes and pens in the Shipping Division were on the highest ground in the Stock Yards. The loading chutes of the Missouri Pacific were quite a distance north of the Exchange Building and located at the lowest part of the yards. The Santa Fe office was advised by the Missouri Pacific office, as early as nine o'clock Saturday morning, that the latter road could not take these cattle. Mr.

Douthitt, General Live Stock Agent of the Missouri Pacific, whose special province and business it was to make arrangements of this kind, and who, the testimony conclusively shows, was the highest authority in the matter, of any agency of the road at Kansas City, testified (p. 267 *et seq.*) that the first he heard of the cattle being in Kansas City was about 8:30 Saturday morning, May 30th, at which time the Santa Fe agent first spoke to him about taking them out. He says (p. 272): "We told them we would not have the power to handle that many trains of cattle without notice; that the indications were we could not get them out under any circumstances. We would make an effort, if the water was not any higher by noon, to load one train that day." Yet, with this distinct and emphatic notification that the Missouri Pacific could not take the cattle, the defendant allowed the opportunity offered by the Burlington to pass, and there is no proof that they even applied to the Burlington, or made any effort to have the cattle taken out. That the Burlington could have taken them any time on Saturday is apparent from Kendrick's testimony, and from the fact that that road having its loading chutes near the Shipping Division in the highest part of the yards, as stated, shipped out a train load of 35 cars of cattle as late as six o'clock Saturday evening. (p. 289, 290).

Defendant had no arrangement with the Missouri Pacific to take these cattle at Kansas City. The statement of the trial court (p. 648) that it had is a mistake. If anything was needed to establish this fact, other than the clear and unequivocal testimony of the only official with whom that arrangement could be finally made at Kansas City, general live stock agent Douthitt, it is not lacking. The list of telegrams (pp. 179-195) is indeed a tangle of wires and they are not rendered more intelligible by their want of chronological order and

the failure to enter on many of the copies produced the hour and minute of their sending and receipt. But from these telegrams it is apparent that no arrangement was arrived at with Missouri Pacific to take the cattle at Kansas City. H. H. Clark, local superintendent at Atchison seems to have thought on Thursday, the 28th, that his road, the Missouri Pacific, would get 142 cars (including the cattle in question) from defendant at Kansas City. He wires Supt. Hurley 7:36 *a. m.*, 28th, (Thursday) (p. 188) "Will accept 42 cars stock Kansas City for Sioux City and Evarts S. D. *with distinct understanding your line will accept all responsibility and pay all claims* that may arise by reason of delays due to high water. * * * *Stock will not move unless above accepted.*" Later, same day, 7:57 *p. m.* (p. 188), he wires "Cannot accept 100 additional cars stock at Kansas City until further advised." Then still later, same day, he wires, 9:52 *p. m.* (p. 189) "Will accept the stock at Kansas City. Advise when you will deliver the 100 car lot." *These are all the wires from Clark on Thursday, 28th, between 7 a. m. and 10 p. m.* It was doubtless these dispatches which lead the Court to so confidently assert that it was arranged with the Missouri Pacific to take the stock at Kansas City. But see what Mr. Hurley was doing on the 28th. He wires General Supt. Burlington, St. Joe (188) "We have 142 cars stock for you destined Sioux City, Iowa, Evarts, S. D. and Stair, Canada. Can you not accept this at Kansas City and handle it through." Burlington answers (p. 189) same date: "Mr. Barnes of the Burlington wires at 6:10 p. m. Expects to have washout at Hamburg repaired by 3:30 p. m. today and if no further trouble can handle business over K. C. road as usual. At 7:26 p. m. he wires, yes, can handle stock for Evarts, S. D. Kansas City to Council Bluffs." *Then same day Hurley wires*

his superintendent at Topeka, McLellan: "I have told Fox to load stock held at Strong City and Wellington which amounts to 100 cars. *K. C. St. J. & C. B. now advise us they are open and can accept it.* If anything arises so they cannot accept it before it reaches Kansas City deliver to Missouri Pacific." He also wires Clark same day (28th) answering the latter's proposition of conditional acceptance: "The stock goes to you on revenue basis, is not detoured, therefore cannot accept any responsibility. We loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City?" To this, as seen above, Clark replied by his wire of 9:52 p. m. that he would accept stock at Kansas City and asking when the 100 car lot would be delivered.

Now note what Mr. Hurley had accomplished on this 28th day of May. He had made a definite and distinct arrangement with Clark for the Missouri Pacific to take the 142 cars of stock at Kansas City. Clark, it affirmatively appears from Douthitt's testimony, had no authority, as superintetndent at Atchison, to make the arrangement, but he did make it and could doubtless have had it ratified. *Mr. Hurley also had made on this same day a definite arrangement with the Burlington general superintendent for that road to take these same* 142 *cars of stock at Kansas City.*

He seems strangely determined to get this hundred thousand dollars' worth of cattle over or into the swollen and constantly swelling Kaw, if it took two connecting carriers to do it. The first 42 cars of the 142, *which he had promised both roads,* were delivered to Burlington. So Clark, Friday, 29th (p. 192), in an offended sort of tone wires: "All arrangements made to handle the 142 cars cattle. Am now advised first 42 cars delivered Burlington. Advise. Also inform me in regard to other

100 cars. When will it be delivered?" This Hurley seems not to have answered and Clark wired him again, 9:14 a. m., Friday (p. 194). "We are holding crews at Kansas City to protect stock. Am now advised you turned the 43 cars over to Burlington. *Can you say if we will get the* 100 *cars? If not, wish to turn the crews back at Atchison.* Please answer quick." Let it be particularly noted what defendant's general superintendent did with this opportunity to have these cattle transported out of this perilous valley into which he was bringing them. He threw it away. Defendant had already broken faith with Clark by turning over to the Burlington nearly one-third of the cars which he had prepared to take, and it was natural and essential that he should desire to save his road the trouble and expense of having crews and equipment on hand to receive the cattle, if he was to be fooled a second time. This is Mr. Hurley's answer (p. 194): "Your wire in regard stock. 19 cars will reach Kansas City about 1:30 p. m. today. Balance of it will reach Kansas City late this evening or tonight. *Cannot give you correct figures on it now, but will do so as early as possible.*" He never did so. This is the last word of the defendant to the Missouri Pacific until it took the mattter up with Mr. Douthitt, Saturday morning the 30th, about 8:30, when they were told that Missouri Pacific was not prepared to take the cattle. Of course it was not. Hurley, in reply to Clark's pointed request, twice wired to know if he would get the 100 cars, does not even tell him he can have the 19 cars expected in Friday afternoon, but says, "Cannot give you *correct figures* on it now, but will do so as early as possible." All this fully explains why Kendrick, the Burlington agent, went to the Santa Fe office Friday afternoon to arrange for taking out the expected cattle. There had been no disturbance or violation of the agreement made Thurs-

day the 28th with the Burlington through its general superintendent at St. Joe to take out the 142 cars. All of these that had arrived, 42 cars, it had received and transported. The balance were coming and Kendrick was on hand ready to receive them. But is it not incomprehensible that defendant, after having thrown down Clark, should fail to avail itself of the chance which was at hand of having the Burlington take the cattle out? Why should the Santa Fe office tell Kendrick that Missouri Pacific was going to take the shipments when it was not, and Mr. Douthitt had distinctly so told defendant's agents as early as 8:30 that morning? The explanation is not far to seek. Mr. Hurley had wired Clark: "Cannot give you *correct figures* on it now." Were there any *figures* about it except that there were 100 cars of stock which "will be in this evening or tonight? There were. Mr. Mullen, president of plaintiff, says (p. 408) that the through freight contracted to be paid was $111.00 per car from Kenna to Evarts, and $100.00 per car from Bovina to Evarts. Mr. Brown, chief clerk live stock department of the Santa Fe, testified (483) that under the general rule a certain portion of that $111.00 per car and $100.00 per car would go to the Santa Fe for hauling to Atchison, and a certain other portion to the Burlington for hauling from Atchison to Council Bluffs, and a certain other portion to the Milwaukee for hauling from Council Bluffs to Evarts; that (486, 487) under the general rule, the haul from Atchison to Council Bluffs not being the same as from Kansas City to Council Bluffs, the same pro rata of the through rate would not apply to the two hauls; and that if a shipment were made over the Santa Fe that was to go by the Burlington to Council Bluffs from Atchison and that shipment came into Kansas City, it would be necessary to make some special arrangement with some

other carrier to make the longer haul from Kansas City to Council Bluffs. It is manifest where Mr. Hurley's "figures" come in. Neither the Burlington nor any other road would haul from Kansas City to Council Bluffs for the same proportion of the through rate as from Atchison. It is plain that by dickering with these two roads and playing one against the other the defendant frittered away the opportunity which both afforded to save these cattle. But whatever the explanation or whether there is any or not, the fact cannot be successfully denied that defendant repudiated its arrangement with Clark and refused the cattle to the Burlington, which was ready to take them. It tried to run on two tracks at once and failed to get on either, for no other perceptible reason than in order to save a few hundred dollars in freight. Therein it was grossly neglectful of its high duty to the plaintiffs. It continued its policy of neglect all day Saturday, 30th, making no effort whatever to get the cattle out of the dangerous location in which it held them—except in the case of 20 cars of this plaintiff's stock, the story of which will be told later on in this statement. Steube, for plaintiffs, haunted defendant's office during Saturday, trying to induce its officers to take some action. As soon as he arrived he went at once to see the Santa Fe agent at defendant's office in the Exchange building. This was about seven o'clock Saturday morning (388)—found the office locked—went then to office of Mr. Allen—remained there awhile, when he and Allen returned to defendant's office about 7:30 a. m. They found there Mr. Brown, chief clerk of the general live stock agent, Mr. Titus. They told Brown (389) that they wanted to get the cattle out as soon as possible. He says, "all right, we are arranging it now." He went to Burlington office and back to Santa Fe office, found Brown out and went to break-

fast. About eight o'clock he and Frost (of the Empire State Company) went to defendant's office and Brown told them he was trying to get the cattle out then (p. 390). "I says, I can't see why we can't get them out at once, at least the train that got in yesterday; *the Burlington man told he can get them out as soon as he gets orders.*" Brown's answer on receiving this information (which he or his office already had) is of importance as showing defendant's gross neglect and disregard of its duty. "He says the Missouri Pacific takes out your cattle," although Mr. Douthitt had informed him or his office that under no circumstances could the Missouri Pacific do any such thing. When asked when this would be done, Brown said, "I let you know soon." Then Steube and Frost went out and rounded up their helpers and charged them to stay around the yards as they were liable to leave at any time. Afterward, about 9 o'clock a. m., they went back to Brown and were told they would get out about noon. They returned about noon (391) and were told that the Missouri Pacific would not take the cattle. What did defendant do in the afternoon and evening of Saturday toward making any effort to forward these cattle or remove them from their place of known peril? Nothing whatever. This record does not contain any evidence that the Santa Fe officials paid any attention to the cattle or did or attempted anything for their preservation and protection from Saturday noon until after the flood. It shows on the contrary that they did not. (Combs recalled, pp. 619-622). Heavy rises were known to be coming on top of a stage of water already threatening the whole valley. Child, general supply agent of the Stock Yards Company, called by defendant, testifies (536) that the great volume of water which caused the enormous rise at Kansas City, Sunday morning, 31st, came from west of Manhattan. "Q.

How long did it take that rise to run from Manhattan to the mouth of the Kaw? A. Forty hours."

"Q. How long would it take the rise to run from Topeka down the Kaw? A. About twenty hours." Connor, of the United States wealther bureau, answers the last question (311), "not more than about thirty hours." He seems to know accurately, for he says: "The crest of the flood moved at the rate of two and six-tenths miles an hour in the Kaw." *So that, taking Connor's statement as the reliable fact, somewhere between midnight Friday the 29th and daylight Saturday the 30th, this destructive rise rolled its tide of waters past the very doors of defendant's general offices at Topeka.* Yet defendant's officers would have it appear, *and the court in effect holds as a matter of law,* that on the appearance of this great rise at Kansas City, it was as unknown and unannounced to them as if it had started at the Belt line bridge at Kansas City, and no jury should be permitted to infer that they knew of or had any reason to apprehend its coming. Not only defendant's officers at Topeka, whence emanated all orders relative to the movement of these cattle, must have known early Saturday morning of the descent of this great volume of water, but it was known and apprehended at Kansas City because communication was not interrupted between the points, and Hutchings, superintendent of the stock yards, says (545), the "general order" to put the cattle in the viaducts was issued *Saturday afternoon.* Why he should call the order "general" is not apparent, because everybody else with cattle in charge in that great market, except defendant and one other party with a small bunch, had sense enough to get them out of the valley. There was nothing comparatively to which to apply the "general" order, except the cattle of these plaintiffs. They were driven

into these narrow viaducts, Supt. Childs says (545), partly Saturday night and mostly Sunday morning, the work being finished about ten o'clock. Steube says they were driven up into the viaducts Saturday night beginning about ten o'clock, and that they were all up there when he saw them about eight o'clock Sunday morning (393). This was an act of most reprehensible folly. It was plain that they could be neither fed nor watered in such a place. The viaduct is merely an elevated chute. They spent some hours, according to Child, cramming this valuable herd of more than 3,000 cattle into these viaducts when all the while they were within twenty or thirty minutes of the highlands and absolute safety. Supplies of men and horses ample to handle and take care of them were at hand. (Allen, p. 622.) But Assistant General Live Stock Agent Combs (p. 580), had heard of loose Texas steers chasing people, and then if taken out they would *"come in contact with dogs* and everything that would frighten that kind of cattle to death." So they were saved from the certain doom which awaited them, if taken to the hills, and were condemned to the viaducts as a preferable and more "practicable" fate. After the cattle had been given this Indian burial, that is after eight o'clock Sunday morning, Sparks, who had 700 mules just across the alley from the pens of the shipping division where these cattle had been yarded, drove them out of the valley and saved them (p. 345). Mr. Moore, one of defendant's counsel at Kansas City, saw the mules being driven out by the Allen avenue viaduct about 11 a. m., Sunday the 31st (p. 422). The cattle remained in these viaducts eight days. The remnant of them were taken by defendant to Emporia, there pastured until July 10th, when they were shipped to Evarts. Those belonging to the respective plaintiffs were not separated until after their

arrival at Evarts (397). This plaintiff received 1,831 head out of 2,293, the rest were dead as a result of their being placed on the viaducts. The remnant was variously estimated to be worth at Evarts from $10.00 to $15.00 per head (399). The cattle when shipped were worth $22.00 per head at points of shipment. The freight paid by plaintiff at Evarts was $6,438.00.

Plaintiffs in its petition seeks to recover this loss and damage from defendant on the following grounds:

(1) The wrongful deviation of the shipments from their route.

(2) The negligence of the defendant in unreasonably detaining the cattle at Wellington and Strong City.

(3) Defendant's negligence in sending the cattle forward into the Kaw valley, at the time and under the conditions when it was done.

(4) Defendant's negligence in deviating the cattle and hauling them to Kansas City.

(5) Defendant's negligence in failing to remove or cause the removal of the cattle from the yards in time to escape the flood.

The answer (pp.11-14), after a general denial, sets up in the second paragraph a series of statements of fact, and we attempt a brief review of the evidence pertaining to each so far as it has not already been referred to.

(a) The answer asserts that defendant, before the arrival of said shipments at Topeka, was notified by the Burlington that it could not accept the cattle at Atchison because of washouts on its line, and that it then made arrangements with the Missouri Pacific to take the cattle at Kansas City. We have already conclusively shown that defendant made arrangements both with Clark, superintendent of Missouri Pacific at Atchison, and with

general superintendent of the Burlington at St. Joe, to take the cattle at Kansas City; that it violated and repudiated the arrangement with Clark on Friday the 29th; that when by reason thereof the Missouri Pacific made no preparation to take the cattle at Kansas City, defendant insisted on its taking them, when they knew it could not, and refused to allow the Burlington to take the cattle, when they knew it could. To this we have nothing to add, except to correct an error of the trial court on the facts in this connection. The court says (p. 653) that the Burlington notified defendant it could not take the cattle at Atchison on account of washouts, and later notified defendant it could take them, and then again notified defendant that it could not take them. All this is true. *But once more and after this,* it notified defendant that it could take them at Kansas City and agreed to do it, and did take all of them there that defendant would allow it to take, forty-two cars (p. 194).

(b) Defendant's answer states that it did transport the cattle to Kansas City "with the knowledge, consent and acquiescence of plaintiffs." No claim was made below, and doubtless none will be made here, that this is true. When the trains reached Kansas City, Steube, in charge, thought he was in Atchison (407). All of the evidence bearing on the matter shows that the cattle were brought to Kansas City solely by orders of defendant without a "by your leave" asked of plaintiffs, though ample opportunity for consultation at all times existed.

(c) The answer next alleges that defendant did deliver twenty carloads of plaintiffs' cattle, 760 head, to the Missouri Pacific railway at Kansas City and delivered the balance to the Stock Yards Company to be held by that company until the Missouri Pacific could take them out. We assert and propose to demonstrate by citation of proof, mostly by defendant's witnesses, the

entire falsity of this allegation. The point of fact of initial importance in this connection is as to the method of making delivery of cattle from one carrier to another through the medium of the Stock Yards Company so that possession and control of the stock pass from one to the other. About this fact there will, or should be, no dispute. Child says (p. 540) the Stock Yards Company paid the delivering road all charges that it had on its bills, took the cattle and bills, and turned the latter over to the receiving carrier with all charges including its own for feed and care added, loading out the cattle on the order of the receiving line. He says (539) that in effecting such delivery the Stock Yards Company acts as agent for both parties. Mr. Douthitt, of the Missouri Pacific, testifies (283):

"Q. Where they were unloaded, as they were in this instance, how would your road get them? A. The way bills would be delivered by the Santa Fe to my office; we would place an order with the Stock Yards Company to run those cattle to our loading chutes at a certain hour; the Stock Yards Company would load them at that time into our cars or cars we furnished at that particular point; the way bills then would be forwarded to the terminal office by my office, and conductor of the train take them out and take them through."

There are very many pages of testimony introduced by defendant relative to the alleged delivery of these twenty cars and the customary manner of making delivery through the stock yards to a connecting carrier. We deem it unnecessary to cite further testimony as to the method pursued, except to add that of defendant's local live stock agent, Roberts, who says (468) that the way bills from the train would be sent over to his office at Argentine by a messenger and then by him (Roberts) turned over to the office of the connecting line.

Now put all of the testimony under the glass and

see whether delivery of these 20 cars of cattle to the Missouri Pacific was ever effected, and whether the Stock Yards Company, while holding all the cattle, ever ceased to be the agent of the defendant. First, as to what was actually done with the twenty cars. Hildebrand, yardmaster of defendant, says (518) he got the train of stock about six o'clock in the morning, *immediately upon its arrival, and was ordered by the Argentine office of defendant* to take it to the Missouri Pacific yards. He "got hold of the train" on one of the main lines between the south end of the Santa Fe yards and Twelfth street, hauled it as far as Twelfth street, and then sent it on in charge of Santa Fe Switchman Cappell (519). Cappell says (pp. 520-521) that he was ordered by Hildebrand to take the train on into the Missouri Pacific yards, situated some distance north of the Exchange building and just east of the Kaw river, and this he did, leaving the train there. Ed Davis, foreman of Stock Yards Company for what is known as "the Missouri Pacific side," (508) testifies for defendant that it was his duty to see that cars were unloaded and loaded; that a switch engine and crew of the Missouri Pacific moved these cars to the Missouri Pacific chutes; that he had them unloaded and immediately drove them back south through the alleys and put them in the shipping division; that being through cattle that was where they belonged (510); that he did this of his own motion, without any orders from anybody; that at the place where they were unloaded there were no pens fit to receive them (p. 511) as there was water in the pens at that time, possibly a foot, and still coming in (512); that if the Missouri Pacific took the cattle out they would be loaded at the same point where they were unloaded (514); that there were no cars there to load the cattle into at the time they were taken from the Santa Fe cars; and that after these cattle

were unloaded the Missouri Pacific did not load any cattle at those chutes (p. 515). So that, as far as concerns *the cattle* of these 20 cars, they simply had a circuitous journey, planned and ordered by the defendant alone, around through the Missouri Pacific yards, and were escorted by the yard foreman back through the alleys to the shipping division, where the rest of plaintiff's cattle were. Now as to the way bills for the 20 cars, without the delivery of which there could be no delivery of the cattle. D. Farley, chief clerk of defendant's local freight office, produces a receipt for these cars (p. 473), purporting to be signed by R. P. Isitt, local freight agent of the Missouri Pacific; says it was made out in the handwriting of one Evans, yard clerk of the Santa Fe (476); that he did not know who signed Isitt's name to it, but knows that Isitt did not (p. 477). Sullivan, defendant's chief night clerk at Kansas City, says (p. 494), another receipt is in the handwriting of one Winthrop, an under clerk in the office; that he (Sullivan) altered the way bills of the 20 cars by scratching out the words "K. C., St. Joe & Council Bluffs" and writing "Mo. P.," and inserting in place of "Atchison" the letters "K. C." (p. 495); he directed Winthrop to deliver the bills with the receipt to the Missouri Pacific (p. 496), and never saw any of the papers after their delivery to Winthrop until the day he testified. This receipt in two sheets marked 14a and 14b, is shown in the record (pp. 497-499), and bears the stamps, Missouri Pacific freight office, *June 30th*, 1903, and A., T. & S. F. Ry. Co., July 4th, 1903, *a month after Sullivan says he gave the papers to Winthrop*, and more than two weeks after the stock represented by the receipt (or what was left of it) had been placed by defendant in the pastures at Emporia. There is not a particle of evidence even tending to show that Winthrop or any one else ever delivered

the way bills and receipt (14a and 14b) to the Missouri Pacific. As to the Isitt receipt for the cars (marked 15), though much discussed, it was not introduced in evidence. Isitt says of it (p. 633): "That is a receipt for the cars, what is called an interchange slip. * * * That is a certificate that the cars have been received and taken for the purpose of adjusting the rental on the cars between different lines, that is the purpose of that slip. That is such a slip as is signed by both lines, no matter what the circumstances are under which the car is delivered, whether it is right or wrong it makes no difference. Q. It doesn't indicate anything, then, in reference to whether your line has accepted for further transportation to another point those cars, or not? A. Not at all." It will be borne in mind that Mr. Douthitt, when he told defendant's agent about 8:30 Saturday morning that the Missouri Pacific could not under any circumstances engage to take the cattle, told him also (and it was a mere mattter of his disposition to accommodate) that he "would make an effort, if the water was not any higher by noon, to load one train that day." At exactly noon he tried with an engine to get to the Missouri Pacific loading chutes, but the water put out the fires and the attempt failed (p. 273): "Q. Now, was there in fact, any cattle delivered to your road—these cattle? A. No, sir. Q. Did you receive from the Santa Fe any order for any of these cattle? A. No, sir. Q. Did you receive from the Santa Fe any way bills? A. No, sir." Hutchings, superintendent of the stock yards, says (p. 546) that he did not know whether the bills for these four trains of cattle showed any routing by any particular line beyond Kansas City or not; that the cattle were taken out by the Santa Fe, the same road that brought them in; that the Stock Yards Company held them as agent for the Santa Fe, delivered them back to

the Santa Fe, required Santa Fe to pay its charges, and if the Santa Fe intended them to be delivered to a connecting carrier, as a matter of fact it was not done. Roberts, local live stock agent, says (p. 468) that these way bills, in ordinary course, would have gone to his Argentine office by messenger and been sent by him to the office of the connecting carrier; *that he found these identical way bills in his office after the subsidence of the flood* (p. 469).

"Q. So that these way bills were not delivered to any connecting carrier at Kansas City, were they? A. Not that I know of; no, sir."

Mr. Combs testified (590): "Q. Your railroad company hauled these (cattle) back to Emporia or Lang to these pastures? A. Yes, sir. Q. And then hauled them from there on to Atchison, and by way of these other roads to Evarts? A. Yes, sir. Q. Under the same original routing and way bills that they had been loaded under from Texas? A. Yes, sir; they were carried to their destination on their usual way bills—on the regular way bills." He admits that in all the numerous conferences held in June between the parties to these suits relative to the cattle, no intimation was ever given that any part of them had at any time been delivered to the Missouri Pacific. The testimony of Mullen (635) and of Frost (636) shows that numerous interviews were held between them and defendant's representatives, Mr. Lathrop and Mr. Combs, in which plaintiffs were urged to take the cattle off of defendant's hands at Kansas City, and at no time did they say anything indicating that one train load had been delivered to the Missouri Pacific. In the stipulation (528) introduced by defendant to support its cross action set up in the third count of the answer, it writes down and signs, "it is agreed in this case that the defendant was compelled to pay out,

and did pay out, on account of plaintiffs' cattle at the stock yards at Kansas City, $2,428.60, and at Emporia $2,820.38." Why should it be compelled to pay or pay anything, if in truth it had delivered, as alleged, twenty cars to the Missouri Pacific and the remainder to the Stock Yards Company for the Missouri Pacific?

In this same third count and counter-claim, it *pleads* the fact (p. 15) "that the said defendant company, as is the general custom, well known to plaintiff, in cases *where cattle in the possession of railway companies in the course of transportation* are fed, watered and cared for by a stock yards company, paid to the said Stock Yards Company the sum of $2,428.60;" and Assistant General Live Stock Agent Combs acknowledges (585, 586) that the expense of unloading the 20 cars at the Missouri Pacific chutes was a part of these charges which defendant paid. Defendant, in this third count, not only *admits,* but *alleges,* that all of these cattle, while in the Kansas City stock yards, *were in its possession in the course of transportation, and bottoms on that fact* its prayer for a judgment against this plaintiff for the expenditure there made on account of the cattle. Yet, in the face of all this overwhelming proof, the defendant, again acting on the principle of "any viaduct in a flood," seeks to save itself by climbing up on the tottering proposition that it had cleared itself of all responsibility by delivering 20 cars to the Missouri Pacific, and the remainder to the Stock Yards Company for the Missouri Pacific. This structure of falsework will break down, it has broken down; and the place where it was is covered by the truth.

(d) The answer next pleads that the damages sued for were caused by the act of God. Elsewhere in this combined brief is discussed the question of whether under the proof adduced defendant can, as a matter of

law, successfully charge the responsibility upon the Almighty.

(e) The answer next pleads that plaintiff gave defendant no notice, as required by paragraph eight of the shipping contracts, of its claim for damages. Plaintiffs' reply (pp. 21, 25) pleads compliance with said paragraph and waiver of its requirements. Due notice was given and claim made (216 *et seq.*) (324). Detail of the evidence, which abundantly shows waiver, is not deemed necessary in as much as no question in this regard was raised on the trial below or in the court's opinion.

(f) The third count of the answer is a counterclaim for the expenses incurred by defendant, while holding the cattle at Kansas City and Emporia, and at the conclusion of all the evidence was dismissed by the defendant (Rec., Minnesota & Dakota Cattle Co. case, p. 30).

The main questions to be determined are:

1. Did the court err on the facts disclosed in not directing a verdict for the plaintiff, by reason of the wrongful deviation of the shipments? If not,

2. Did the court err in refusing to submit the questions of negligence to the jury and in directing a verdict for the defendant?

3. Did the Court of Appeals err in holding that consideration of those questions was precluded because plaintiff requested a peremptory instruction, although it at the same time submitted to the court thirteen other instructions to the jury?

SPECIFICATION OF ERRORS.

1. The trial court erred (Rec., 637) in refusing to give, at the conclusion of all the testimony, the instruction and charge tendered and requested on behalf of the plaintiff, that under all the evidence the jury should find that the defendant was liable, and to find for the plaintiff. The court should have so instructed, because the undisputed proof shows a deviation by the defendant, without plaintiff's consent, of the shipments of cattle from the route by which they were billed, and in such case as a matter of law defendant is liable for the loss sustained.

2. The court erred, after refusal of this peremptory instruction, in refusing to give and charge the jury, at plaintiff's request, instructions from 1 to 13, inclusive (Rec., 638, 644), and in refusing to give each of said instructions.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing, the jury to render a verdict for the defendant and against the plaintiff. (Rec., 30.)

4. The court erred in its opinion, shown in the record, in saying: "It, therefore, follows on the main case the request for instruction to the jury to render a verdict for the defendant must be sustained, and the like request of the plaintiff must be denied. This will be done." (Rec., 655.)

5. The opinion of the Circuit Court of Appeals holding that plaintiff waived the right to have the negligence issues submitted to the jury, or considered by the Court of Appeals, because plaintiff prayed for a peremptory instruction, although plaintiff at the same time submitted thirteen instructions to the jury, is erroneous. See copy of petition for the *certiorari* in this Minnesota & Dakota case in the appendix herein.

POINTS AND AUTHORITIES.

All propositions, and authorities cited and reviewed in support thereof, as set forth in the preceding brief, are here adopted pursuant to the stipulation and agreement between the parties that a joint brief might be filed.

In view of the fact that the errors assigned, and the propositions involved, are precisely the same in both cases, all of the authorities relied on by plaintiffs in error in both cases have been compiled and reviewed in the foregoing brief of the Empire State Cattle Company, *et al.* To avoid unnecessary repetition, we re-state briefly the points made, as follows:

1. For the purpose of determining whether the action of the trial court in peremptorily directing a verdict for the defendant was correct or erroneous, all of the testimony offered, both that which was admitted and that which was excluded, will be considered by this court.

2. The question of whether the defendant is liable as a matter of law for the wrongful deviation of the shipments, and whether, therefore, the court erred in refusing the plaintiffs' request to direct a verdict for the plaintiff, is a separate and distinct question from that of whether the court erred in holding as a mattter of law that there was no evidence sufficient to go to the jury, on the matter of the defendant's negligence. Plaintiff had and has, a right to the separate determination of these questions.

3. Even if the plaintiff was not entitled to a peremptory instruction to the jury to find for the plaintiff, by reason of the wrongful deviation of the shipments, the other and further question of defendant's negligence should have been submitted to the jury under proper instructions.

4. Under the facts proven, the question of the proximate cause of the injury was a question for the jury to determine as a matter of fact, and not for the court to decide as a mattetr of law. It should have been submitted to the jury.

5. The opinion of the trial court (135 Fed., 135) fails to consider many of the facts which are vital to a correct conclusion, and incorrectly declares the law of the case, as we have heretofore shown.

6. The trial court, in its opinion (*supra*, p. 142), recognizes that the defendant deviated these shipments on its own responsibility, as claimed by plaintiff, but incorrectly declares the law in such cases. Under the evidence the defendant is liable for the consequences of that deviation.

7. The propositions of law asserted by the trial court in its opinion are not supported by the authorities therein cited and relied upon.

8. The fact that immense quantities of household property and merchandise were lost in the flooded districts of Kansas City has no tendency to show that the defendant was not negligent in respect to the loss suffered by this plaintiff.

9. It was not necessary, as assumed by the trial court, to place these cattle in the overhead viaducts at the stock yards. It was a grossly negligent act to do so.

10. The decision of the Court of Appeals is erroneous for the reasons given in the petition for the *certiorari* in each case which is reprinted in the appendix herein.

ARGUMENT.

Supplementing the argument heretofore made, we will refrain from making the brief more voluminous, except to devote a very limited space to the principle which should govern in determining whether a trial court should or should not take a case from the jury and peremptorily direct its verdict. A most instructive and luminous decision in which the duty of the trial court is defined and the principle applied, is found in the case of *Marande* v. *R. R.*, 184 U. S., 173. That was an action to recover from the railroad the value of certain cotton which was destroyed by fire while in defendant's cars on its tracks near its terminal wharf, it being claimed by the plaintiff that defendant was negligent (a) in operating its locomotives near the cottom on the wharf; (b) in failing to properly care for the property, and (c) in providing inadequate fire apparatus, together with lack of instructions in its use and lack of competent men to handle it. The Circuit Court, at the conclusion of the evidence, had directed a verdict for defendant, and the Circuit Court of Appeals affirmed the judgment. The defendant being incorporated under an act of Congress, plaintiff took the case to the Supreme Court by writ of error. That court reversed the judgment of the Court of Appeals and of the Circuit Court, and directed a new trial. Two assignments of error were considered; one that the case should have been allowed to go to the jury on the issue of deviation, and the other that plaintiff should have been allowed "to go to the jury on the general question of the loss of the cotton by the negligence of the defendant." Mr. Justice White, delivering the opinion, said (176): "In order to pass upon the issues arising on these assignments, the evidence must be considered. In taking it into view, however, we shall do

so only to the extent necessary to enable us to decide the question of law which arises, that is, *was the evidence sufficient on the subject of negligence and deviation to go to the jury?*" After an elaborate statement of the evidence, he proceeds (186): "Such being the proof, was it sufficient to go to the jury? In answering this question, as we have said at the outset, we shall be called to pass upon, not the preponderance of the evidence, but whether it was adequate to go to the jury; and this involves not a decision as to the facts, but the determination of a proposition of law." He then quotes the governing principle from 172 U. S., l. c., 545: "If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves." And again, from 179 U. S., l. c. 659: "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinary negligence is so far a question of fact as to be properly submitted to and determined by them." Mr. Justice White then continues (191): "We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its functions, could have inferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so, we shall, of course, be mindful that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—*a respect, however, which cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.*"

In the above cited case, the bill of lading provided for the carriage of the cotton by defendant to "the port of New Orleans," and thence by steamship to Havre, France. It seems that plaintiff contended both that defendant had deviated the shipment, whereby it was liable for the loss, and that the loss was occasioned by the negligences specified. The action of the trial court in holding that there was no sufficient evidence of the fact of deviation to authorize the jury to find such fact is approved by the Supreme Court, but guarded with the remark (p. 198): "We cannot say that testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us." In the case at bar *the fact* of deviation is not at all in question, and the issue presented to this court in that regard is, what is the legal effect of that fact on the question of defendant's liability? Does it render the defendant liable, irrespective of the negligence charged? Plaintiff contends that it does. If it is right about this, the court should have so told the jury, leaving them to find and fix the quantum of damages. Or, is the conceded fact that defendant summarily hauled these cattle away from their line of shipment, without consulting the owner, a matter by which it incurred no responsibility, and of which plaintiff has no right to complain? In other words, is it an immaterial fact not bearing on the question of liability? The lower court so held. The Supreme Court seems, in the case just cited, to have thought it of vital moment, and that liability would as surely follow its existence as would nonlitbility its non-existence. On the question of negligence involved in the cases at bar, in order to approve the action of the trial court in directing a verdict for the defendant, it is necessary to hold,

1. That the fact of deviation is an immaterial fact;

2. That there is no evidence tending substantially to show, or from which a jury would be allowed to infer, negligence in detaining these cattle at Wellington and Strong City, or that even if the detention was negligent it was immaterial as not being the proximate cause of the loss;

3. That there is no evidence from which a jury will be permitted to infer that defendant's officers knew, or had reason to apprehend, at the time of bringing the stock to Kansas City, they were bringing them to a hazardous place, or that if they did, their negligence was immaterial because, as a matter of law, it was not the proximate cause;

4. That there is no evidence from which reasonable men could conclude that during Saturday, May 30th, defendant was negligent when its officers declined to send the cattle out over the Burlington, and made no effort to send them out otherwise, except to offer them to the Missouri Pacific;

5. That there was no substantial evidence that defendant's officers, on Saturday, May 30th, knew, or ought to have known, of the enormous rise coming, although the undisputed evidence of competent witnesses is that it came from west of Topeka, and must have passed defendant's general offices from twenty to thirty hours before reaching Kansas City;

6. That no jury will be permitted to find that the act of placing these cattle in the viaducts, when they could easily have been taken out of the valley, was other than the act of a reasonably prudent and careful person.

The authorities heretofore cited demonstrate the impossibility of upholding the action of the court in taking the case from the jury on the facts shown. A com-

mon carrier cannot be guilty of doing the acts shown in this record, and of omitting to exercise that vigilance and care of property to which the shipper is entitled, and then evade responsibility by saying, "It was the act of God—the Lord hath taken away."

It is respectfully submitted that the judgments should be reversed and a new trial of the cases directed.

R. E. BALL,
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JAMES S. BOTSFORD,
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Empire State Cattle Co., et al.

APPENDIX.

—IN THE—

Supreme Court of the United States.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent.*

PETITION

For the Issue of the Writ of Certiorari Herein, to the United States Circuit Court of Appeals of the Eighth Circuit.

Petitioners, for the purpose of obtaining a writ of *certiorari* herein, represent as follows, to-wit:

This suit was brought by petitioners as plaintiffs against respondent as defendant, in the Circuit Court of the United States for the District of Kansas, First Division, on November 13, 1903. It is an action at law to recover Fifteen Thousand Dollars damages, for the death of a portion, and injury to the residue, of 798 head of cattle belonging to plaintiffs, which were shipped over defendant's railway through the state of Kansas. The cattle were purchased by the plaintiffs, in Texas, and were shipped over defendant's road, destined to go to the pastures of plaintiffs in South Dakota.

The petition averred and the proof at the trial showed, that the plaintiff cattle company was a corporation created by the laws of South Dakota, and that the other plaintiffs were residents and citizens of South Dakota, and that the defendant railway company was a corporation created by the laws of the state of Kansas, having its chief office at Topeka, in the First Division of the state of Kansas, in which this suit was brought.

The case was tried by the said Circuit Court, with a jury. The trial continued for a period of nine days, from January 16, 1905, to January 25, 1905, and the trial was had on the petition of plaintiffs, the answer of defendant, and the reply thereto, of the plaintiffs.

The case of the plaintiffs, both in the Circuit Court and in the Circuit Court of Appeals of the Eighth Circuit, was prosecuted by them upon the theory of the liability of the defendant to plaintiffs, on two grounds. First, that the death of and injury to plaintiffs' cattle resulted from the deviation by defendant of the shipment, without plaintiffs' consent, from the line on which the cattle were routed to go; and, second, that the death of and loss to plaintiffs' cattle resulted also from the different negligences of the defendant specified in the petition of plaintiffs.

At the conclusion of the trial, plaintiffs asked the court to give, and presented to the court, fourteen different instructions to the jury. Those instructions may be found from pages 637 to 644 of the Record.

The first instruction (p. 637) was a peremptory instruction which the plaintiffs prayed the court to give, instructing the jury peremptorily to return a verdict in the case for the plaintiffs. This instruction was founded upon the proposition maintained by plaintiffs that defendant was absolutely liable to plaintiffs on the facts of the case, as a matter of law, for the death and loss of

plaintiffs' cattle, by reason of the deviation of the shipment from the routed line without plaintiffs' consent; and the prayer in this peremptory instruction proceeded upon the theory that that branch of the case, on the undeniable and conceded facts of the case, presented a question of law for decision by the court.

The other thirteen instructions presented at the same time with said peremptory instruction and to be found from page 638 to 644 of the Record, were instructions asking the court, in the event that the peremptory instruction should be denied, to submit to the jury the issues of negligence in the case. All of the thirteen instructions referred to, asked the court to submit the issues of negligence to the jury. It was, of course, understood by the court, as well as by counsel, that, if the peremptory instruction based on the unlawful and wrongful deviation, was given, it would not be necessary to consider those other instructions.

At the same time plaintiffs presented those several instructions, defendant asked a peremptory instruction to the jury. The court gave the defendant's peremptory instruction to the jury, to return a verdict for the defendant, and denied each and all of plaintiffs' said instructions. To those several rulings, plaintiffs excepted at the time.

The jury, under the instructions of the court, gave a verdict for the defendant (p. 644, Record), and a final judgment was given for the defendant (pp. 26-27, Record).

Afterwards plaintiffs filed a bill of exceptions in the case, which extends from page 29 to page 656 of the printed Record.

The pleadings in the case may be found from page 3 to page 21 of the Record.

A history of the trial of the case will be found from page 21 to page 28 of the Record.

The final judgment in the case, in the Circuit Court, was given January 25, 1905.

Within due time the cause was duly removed by a writ of error, citation and by filing an assignment of errors to the United States Circuit Court of Appeals of the Eighth Circuit.

The case was heard in the Circuit Court of Appeals in December, 1905, and was decided by that court July 9, 1906, by an affirmance of the verdict and judgment of the Circuit Court. (*Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep., 457.)

Afterwards, on August 9, 1906, said Circuit Court of Appeals made an order extending the time to November 1, 1906, within which plaintiffs could file their petition for a rehearing in said cause.

Afterwards, on September 20, 1906, plaintiffs filed their petition for a rehearing in said cause, after serving the same on counsel of defendant, and said petition for a rehearing having been served and filed, in accordance with the rules of said United States Circuit Court of Appeals, was considered by that court and denied, November 17, 1906; and, by the denial of said petition for a rehearing, said judgment of affirmance of said Court of Appeals of the said judgment of the said Circuit Court in said cause became final. (Record, 677-687.)

Said petitioners further show to the court, as will appear from the opinion of said Circuit Court of Appeals, (147 Fed., 457), that said judgment of affirmance by said Court of Appeals was based upon the ground adjudged in its opinion by said Circuit Court of Appeals, that, because plaintiffs, at the conclusion of the trial of said cause in said Circuit Court, presented to and requested said Circuit Court to give a peremptory instruc-

tion to the jury to return a verdict for plaintiffs, plaintiffs were precluded from the right to have considered said other thirteen instructions, although presented at the same time of and with said peremptory instruction in the event that said Circuit Court should deny said peremptory instruction asked by plaintiffs.

Petitioners say they are advised that said ruling of the Circuit Court of Appeals in its opinion affirming the judgment in this cause, is the first and only time that it has been adjudged by any American court, state or federal, that a party to a suit, who asks the giving of a peremptory instruction to a jury and at the same time asks the giving of other instructions to the jury submitting the issues to the jury in the event that the peremptory insruction thus asked shall be denied, is precluded, by the asking of such peremptory instruction under those circumstances, from having the other instructions considered, if the peremptory instruction is denied. Petitioners say they are advised that it is the general practice as understood by the members of the American bar, generally that where, as in this case, instructions are asked, one of which is a peremptory instruction to the jury and the others submitting the issues to the jury, for the court, in the event of the denial of the peremptory instruction, to consider the other instructions for the submission of the issues to the jury; and petitioners in that view, submit that the decision in this cause by said Circuit Court of Appeals is contrary to the general practice which prevails in the federal and state courts in like cases.

Petitioners show to the court, as appears from the opinion of said Circuit Court of Appeals, that said opinion is contrary to a decision of this court and to the decisions in like cases of other Circuit Courts of Appeal and is also contrary to the decisions of the Court of Appeals of the state of New York, cited in said opinion in this case.

Said petitioners, in order to enable this court to see how the issues of deviation and negligence in this case arose, submit in this, their petition for a writ of *certiorari*, the following statement of facts:

On May 25, 1903, petitioners were the owners of the 798 head of cattle in controversy at Hereford, Texas, which they shipped from said Hereford for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made from said Hereford, Texas, over three lines of railway, to-wit, from said Hereford to Amarillo, Texas, over the Pecos & North Texas Railway; from Amarillo to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company at said Atchison, Kansas.

Said 798 head of cattle, in the cars in which they were shipped, were delivered to defendant at said Amarillo, Texas, for shipment over defendant's railway north to Atchison, Kansas, to be there delivered by it to said connecting railway company, and said defendant, on May 25, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amarillo, Texas, to said Atchison, Kansas.

Said 798 head of cattle were transported by defendant, as such common carrier, from Amarillo, Texas, to Strong City, Kansas, which is a station on said defendant's line of railway between said Amarillo, Texas, and Atchison, Kansas.

In said state of Kansas where said defendant's railway crosses said state, in passing from Amarillo, Texas, to Atchison, Kansas, there are three cities situate on said railway, viz: Strong City, Kansas; Emporia, Kansas, and Topeka, Kansas. The general course of defendant's railway across said state of Kansas, in passing

from Amarillo, Texas, to Atchison, Kansas, is from southwest to northeast. Strong City, Kansas, is southwest, or southwesterly, from Topeka, and Emporia, Kansas, is between Strong City, Kansas, and Topeka, Kansas.

Said cattle of petitioners were unloaded by defendant into defendant's pens at said Strong City, Kansas, on May 26, 1903, for the purpose of being fed and watered and of obtaining rest, as provided by the law of Congress in such cases. Petitioners' cattle were so unloaded on the night of May 26, 1903, and were ready to be reloaded and for the transportation to be continued and the transit resumed on the next morning of May 27, 1903.

During the entire month of May, 1903, there were continuous rains night and day, in the valley of the Kaw river, which flows from Eastern Colorado to Eastern Kansas, east, across the state of Kansas, and which empties into the Missouri river at Kansas City, Missouri. The watershed of the Kaw river extends from the southern portion of Nebraska across the northern part of Kansas, to a point about ten miles south of said Kaw river.

Said rains created in the valley of said Kaw river an unprecedented flood, which commenced to rise about May 15, 1903.

Notwithstanding said 798 head of cattle had been fed and watered and had time to rest so that they were ready to be reloaded and were ready for the transportation and carriage thereof to be resumed and continued on the morning of May 27, 1903, defendant railway company, by reason of the rise of said flood, detained said cattle on its, the defendant's own motion, at said Strong City, in the pens of defendant, from the said morning of May 27, 1903, until noon, May 29, 1903. Said May 27, 1903, was on Wednesday, and said flood,

as we will see further on, reached its climax Saturday night, May 30, 1903. After so detaining said cattle at Strong City from Wednesday morning to Friday noon, May 29, 1903, and after loading, unloading and reloading said cattle two or three times at Strong City by defendant railway company, defendant continued the transportation and transit of said cattle Friday noon, May 29th, 1903, and said cattle were by defendant then hauled from Strong City, Kansas, to Emporia, Kansas, which last city is southwest of Topeka, Kansas, and is on the uplands some considerable distance from the valley of the Kaw river at Topeka.

As already stated, said 798 head of cattle were routed to go over defendant's railway northeasterly, passing through said Strong City, Kansas, Emporia, Kansas, and across the Kaw river at Topeka, and thence northeasterly to Atchison, Kansas, which is situate on the Missouri river. (Opinion of trial court, Record, p. 645, 135 Fed. Rep., 135.)

On the arrival of the cattle at Emporia during the afternoon of Friday, May 29, 1903, it was and had been for six hours and more known by the defendant's officers and servants, that the line on which these cattle were routed to go to Atchison, crossing over the Kaw river at Topeka, was flooded and had been flooded from two o'clock that morning, so as to be impassable; that defendant's line from Topeka to Kansas City had been likewise flooded so as to be impassable and the transit and transportation of said cattle at said Emporia was by defendant, its officers, agents and servants, without plaintiff's consent, deviated from their route and transit over defendant's line northeast to Topeka and Atchison, to another line of defendant, known as the "Ottawa cut-off" and which cut-off extended from Emporia to Kansas City, by way of Ottawa, Olathe and Holliday, and from

Holliday over its line from Topeka to Kansas City, Missouri.

In this connection, it should be stated that the defendant had and has no railway running from Kansas City to Atchison, Kansas. The only railway owned or operated by defendant, either in 1903 or since, north or east from Kansas City, is its line from Kansas City to Chicago.

The transit and transportation of said cattle which were thus deviated at Emporia, Kansas, were so deviated for the purpose of transporting the same over said cut-off of defendant, to Kansas City, Missouri, which was sixty miles and more east of Topeka, Kansas, and distant that far from the line of defendant's railway on which, by the shipping contract of the parties, said cattle were routed to go in their passage to South Dakota.

After the deviation of said cattle at said Emporia, Kansas, over said other line, defendant ascertained that it could not get to Kansas City over its own line; and, on the arrival of the train containing the cars which carried petitioners' cattle, at Olathe, Kansas, during the night of Friday, May 29, 1903, defendant, finding that it could not get to Kansas City over its own line in consequence of the fact that all of its lines west of Kansas City, including said cut-off, were flooded, transported said train of cars containing petitioners' said cattle in a roundabout way to said Kansas City from said Olathe, over the tracks of the St. Louis & San Francisco Railway Company. In this way defendant succeeded in transporting said train of cars conveying petitioners' said cattle from the uplands over which said cattle had been transported up to that time, to the valley and mouth of the Kaw river at Kansas City, where said defendant, without obtaining petitioners' consent, unloaded said cattle in the shipping pens at the Kansas City Stock Yards, alongside of and

at the mouth of said Kaw river. Said cattle were unloaded in said stock yards on the morning of Saturday, May 30, 1903. On Sunday, May 31, 1903, the said flood which had so continued during a large part of said month of May, 1903, in the valley of said Kaw river, rose to such heights as to flood said stock yards, and said cattle, having been left without any further attention by defendant railway company after the deposit by it of said cattle in said stock yards, were, by the agents and employes of said stock yards company, driven out of the pens in said stock yards on said Sunday, up into the overhanging viaducts and chutes which passed through and over said stock yards. This was done by the officers and employees of the Stock Yards Company, for the purpose of preventing said cattle from being drowned in said stock yards. Said cattle remained in said overhanging chutes and said viaducts several days, during which time, in consequence of the impossibility of feeding and watering said cattle, a large number of them died and the balance were very seriously damaged.

The petition of the plaintiffs in the case, after fully stating the foregoing facts, and other facts, summed up therein the grounds of liability claimed against the defendant, as follows:

"1. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprece-

dented flood in said Kaw river had subsided, so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment by said defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood."

At the trial of the case in the Circuit Court, Mr. Connor, who has charge of the United States Weather Bureau office at Kansas City, Missouri, testified that the rainfall which produced the Kaw river flood of May, 1903, commenced in April, 1903; that there was a slight cessation of the rain early in May and another cessation from about the 15th to the 18th of May, 1903, and with that exception the rains were continuous through May, night and day. (p. 300, Record.)

The defendant, during 1903 and ever since, has had its chief offices at Topeka, Kansas, which is about sixty miles west of Kansas City, and Mr. Connor testified that a flood in the Kaw river at Topeka would, in the regular course of the flow of water, reach Kansas City in about thirty hours.

Mr. T. E. Jennings, who had charge of the United States Weather Bureau at Topeka, Kansas, testified that the rainfall the first twenty days of May, 1903, averaged about four inches, in the western part of the Kaw water shed; that from the 21st to the 28th of May, 1903, the rainfall in that region averaged another four inches, and that on May 28, 1903, came the tremendous rainfall in that region, which was about five and one-half inches, at Salina, Kansas. He said, "We got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next 7 days that was repeated, and on the 28th we had the tremendous downpour in the central counties, extending from Salina county northeastward into Marshall." (p. 129, Record.)

Another witness in the case (p. 223, Record) was W. E. King, Assistant City Engineer of Topeka, Kansas, who testified that he took observations of the rise of the Kaw river at Topeka, and that on the morning of May 28, 1903, at 8:30 o'clock, the Kaw river was then 16.88 feet, or eleven inches, above low water mark; that the Kaw river continued to rise after that; that he kept men stationed at that point until the crest of he flood; that he had a thirty minutes continuous report from May 28, at 8:30, to June 6, at 10:30; that the crest of the flood was reached at 9 p. m. on May 30, and that between 8:30 the morning of the 28th, and 9 p. m. of May 30, the water rose ten and one-tenth feet.

The testimony of Theron S. Cafferty (p. 225, Record), and of C. T. McLellan (p. 292, Record), who were

division officers of defendant company, shows that de-defendant's roads in Kansas, from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City, were all flooded from an early hour on the morning of Friday, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded, as already stated, from an early hour on the morning of Friday, May 29, 1903, and that those facts were well known, not only by those division officers of defendant company, but by Superintendent Hurley and all the general officers of the defendant company; that so extraordinary and perilous were the flood conditions on all of defendant's lines in the State of Kansas on said Friday morning, May 29, 1903, that attention was given to those conditions by Superintendent Hurley and the other general officers of the defendant, and that the movements of the train in question carrying petitioners' said cattle, were directed personally by Superintendent Hurley and the other general officers of the company, and the facts show that for six hours before said Friday noon, May 29, 1903, when said transit was resumed from said Strong City, said lines were and had been so flooded as to make it impossible for the defendant to reach the valley of the Kaw river or to cross the same, or to reach said Kansas City over any of the said lines of defendant. The evidence at the trial, which fully sustains all the averments of the petition and shows the foregoing facts, proves that the defendant company in starting said shipment from Strong City and in deviating the same from said Emporia, knowingly and wilfully went into the mouth of the flood, at its climax.

In support of the first specification above named, that defendant was negligent in detaining petitioners' said cattle at said Strong City from Wednesday morning

May 27, 1903, to Friday noon, May 29, 1903, reliance at the trial was placed on the testimony of the witnesses W. H. Frost (p. 37, Record), G. W. Cloyd (p. 31, Record), and J. D. Carr (p. 116, Record). By the testimony of those gentlemen it was shown that at the same time of the purchase and shipment of those 798 cattle out of Texas, another train load of cattle was bought by plaintiffs and shipped, in like manner. The shipping contracts and the billing and routing of that other train load of cattle, which contained 763 head of cattle of the same class and character of cattle as the 798 head of cattle in controversy, were in all respects the same as the shipping contracts and the billing of the 798 head of cattle in controversy. The only difference between the other train load, which was in charge of Cloyd, was that it was about four or five hours ahead of the train load containing the cattle in controversy. Said other train load of 763 head of cattle was likewise stopped at Strong City, for feed and water and rest, but the transit and transportation of said other train load of cattle was resumed and continued by defendant, Wednesday evening, May 27, 1903, from said Strong City, and said other train load of cattle was hauled by defendant over its said line through Emporia and Topeka, to Atchison, Kansas, and there delivered by defendant to the connecting carrier, and by the connecting carrier continued north, so that said other train load reached its destination in South Dakota on Monday, June 1, 1903.

The evidence shows that both those train loads of plaintiffs' were in the stock yards at Strong City, from Tuesday night until Wednesday evening, when, as already stated, said other train load was hauled out and its transit and transportation continued by defendant to its destination. The history of said other train load of cars, as given above, shows that defendant was negligent

in not continuing from said Strong City, on said Wednesday, May 27, 1903, the transit and transportation of the train load of cattle in controversy.

Defendant was likewise negligent respecting the second of the above specifications, in leaving said Strong City on said Friday noon. As already stated, all of defendant's lines in Kansas were flooded early that Friday morning, and the testimony of Assistant Engineer King, of Topeka, shows that on Friday there was a tidal wave of water passing down the Kaw, which had accumulated from the rains described by said Jennings and had reached at that time the City of Topeka and which, according to the testimony of Weather Bureau Superintendent Connor, was certain to reach Kansas City within thirty hours after its passage by Topeka on said Friday. It was therefore reckless, if not madness, for defendant, having detained petitioners' cattle at said Strong City over two days, to attempt to reach or get across the Kaw river after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river.

The third specification, that defendant was negligent in endeavoring to get across the Kaw river by taking the cattle over its cut-off from Emporia, was sustained by the evidence.

The fourth specification of negligence was also sustained by the evidence.

The fifth specification of negligence, that defendant carelessly and negligently failed and neglected to move, or cause to be moved, said cattle from their position of peril in said stock yards, was sustained by the evidence.

One of the witnesses in the case was William M. Kendrick (Record, p. 283), who was the live stock agent at Kansas City of the C., B. & Q. R. R. Co., and who

testified that his company could have taken petitioners' cattle out of Kansas City, north across the Kaw River, on the afternoon of Saturday, May 30, 1903; that he offered to defendant to take and transport the cattle in controversy, but that the defendant company refused and neglected to deliver the cattle to the said "Burlington" Company for that purpose; that as evidence of the fact that said Burlington Company could have taken petitioners' cattle out of and across said Kaw River, northerly, out of Kansas City on said Saturday afternoon, Mr. Kendrick testified that on said Saturday evening, May 30, 1903, 35 cars of cattle were shipped out of Kansas City north across said Kaw River by said Burlington Railroad Company (Record, pp. 227-228).

Another witness in the case was W. C. Sparks (Record, p. 345), who testified that he was a member of the firm of Sparks Brothers, who were engaged in the mule business at Kansas City and had a mule yard a block south of the Kansas City Stock Yards, where petitioners' cattle were penned, and that on Sunday morning, May 31, 1903, Mr. Sparks' company drove out of their said mule yards, between six hundred and seven hundred head of mules, up out of the Kaw valley south, up to and on the uplands immediately south of Kansas City, and that in this way their mules were saved from the flood; and the testimony of Mr. Sparks shows that the same could have been done on that Sunday morning by defendant company, with respect to petitioners' said cattle in said stock yards, and that that was the wise and prudent course to have taken concerning petitioners' cattle instead of driving them up into said overhanging viaducts and chutes where petitioners' cattle were certain to and did suffer and die from starvation and want of water.

Another witness in the case was L. A. Allen (Record, p. 226), who testified that there were plenty of men

and instrumentalities in and around the stock yards in Kansas City on that Sunday morning, by whom the cattle of petitioners could have been driven out of said stock yards.

The testimony in the case shows that said cattle of petitioners in the stock yards and the cattle of the plaintiff, Minnesota & Dakota Cattle Company, in the other companion case, presented also to this court for the writ of *certiorari*, constituted about all the cattle that were in the stock yards at said Kansas City on said Sunday, May 31, 1903.

Another witness in the case was one G. A. Roberts (Record, pp. 522-523), who was the live stock agent of the defendant company at Kansas City, whose testimony shows that defendant and its agents and officers gave no attention to the cattle of the petitioners after they were thus deposited Saturday morning, May 30, 1903, in said stock yards, by the defendant railway company.

Another witness in the case was one A. W. Coombs (Record, p. 580), who was the Assistant General Live Stock Agent of defendant company at Kansas City, and who testified also that the officers of defendant company gave no attention to these cattle after they were deposited Saturday morning in said stock yards.

Another witness in the case was one Sharp, who was the superintendent of defendant's terminals at Kansas City, and whose testimony shows that he and General Superintendent Hurley were engaged Saturday and Saturday afternoon in moving from the defendant's yards at Argentine a large number of cars and engines out of danger from the rising flood, but that neither of those officers, nor any of the other officers of defendant, paid any attention to petitioners' cattle which had been by defendant thus deposited in said stock yards.

Petitioners submit that the opinion of the Circuit Court of Appeals in this case is opposed to the decisions of the New York Court of Appeals, cited in said opinion of said U. S. Court of Appeals. Thus, in *Kurtz* v. *Peck*, 113 N. Y., 222, it was adjudged that:

"Where, upon a jury trial, each party asks that a verdict be directed in his favor and neither asks to go to the jury on the questions of fact, the court is authorized to find upon the facts."

The above language clearly indicates that the court, in that case, held that if a party asks for a peremptory instruction and at the same time asks, in the event of the denial of that instruction, to go to the jury upon questions of fact, the party is not precluded by his peremptory instruction.

The same ruling was made by the same court, in *Sutter* v. *Vanderveer*, 122 N. Y., 652.

In the case of *Koehler* v. *Adler*, 78 N. Y., 287, the New York Court of Appeals, in an opinion delivered by Chief Justice Church and concurred in by the full bench of that court, used the following language:

"The action was for money loaned, and the verdict was directed by the court. The defendant alleges error in not submitting the case to the jury. At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, and the defendant then requested a like direction in his favor. The court stated that he thought the plaintiff entitled to the direction. The counsel for defendant then asked to go to the jury upon the question whether the debt in suit was ever contracted at all. This was denied, and an exception taken. Upon these facts we think that the defendant was entitled to go to the jury if the case warranted it. If nothing furher had been done after both parties asked a direction of a verdict, it would be assumed that they intended to waive the right of submission to the jury, and consented that the court should decide the question of law and fact in-

volved. But after a request, and a refusal to direct a verdict, there is no absolute inconsistency in asking to submit questions of fact to the jury. It is not proper, ordinarily, to direct a verdict if there is any material question of fact which ought to be submitted, and it is error to make the direction in such a case. Parties may consent, however, that the court may pass upon all questions both of fact and of law, and if they do they will be bound, and when both parties ask a direction this court will presume such consent. In this case the presumption is repelled by an express request to go to the jury upon a question of fact."

Said opinions of the New York Court of Appeals are in harmony with the understanding of the profession and the practice which everywhere prevails, both in the state and federal courts, by which practice a party may submit a series of instructions to the court, one of which is peremptory in its character and the others of which are asked by the party submitting the instructions, in the event that the peremptory instruction is denied.

Petitioners are advised that great surprise will be experienced on the part of the bar, if this rule contended for by them in this case is permitted to be overturned by an affirmance of the decision of the Court of Appeals in this case. The opinion of the Court of Appeals in this case is also opposed to the express decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Tigua Iron Co.* v. *Greene*, 88 Fed., 207; 31 C. C. A., 477. The decision of the Circuit Court of Appeals in that case, as will be seen from the opening paragraphs of Circuit Judge Lacombe's opinion, is squarely in favor of the proposition we contend for and is decisive against the decision of the Court of Appeals in this case. Between the Circuit Court of Appeals in the Second Circuit, in that case, and the Circuit Court of Appeals in this case, there is a direct and irreconcilable conflict

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In the case of *Merwin* v. *Magone*, 70 Fed., 776; 17 C. C. A., 361, the court in its opinion by Judge Shipman, said:

"It will be observed that neither party raised a question of fact, and each asked for a direction in his favor. In such a case, the finding is conclusive if there is any evidence to sustain it."

To the same effect is *Magone* v. *Origet*, 70 Fed., 778; 17 C. C. A., 363.

So in the decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Chrystie* v. *Foster*, 61 Fed., 551; 9 C. C. A., 606, that court, in its opinion by Judge Wallace, said:

"Where the defendant excepts to the direction of a verdict for the plaintiff, but makes no request to go to the jury, he cannot be heard to assail the judgment upon the ground that there were questions of fact for the jury. *Provost* v. *McEncroe*, 102 N. Y., 650, 5 N. E., 795. Where both parties move for the direction of a verdict, and neither requests any question of fact to be submitted to the jury, they concede that there is no question of fact, and that the case turns wholly upon the questions of law, which are to be determined as though the facts were undisputed."

The opinion of the court is also opposed to the opinion and decision of the Circuit Court of Appeals of the Sixth Circuit, in the case of *Monahan* v. *Grand Trunk Western Ry. Co.*, 138 Fed., 37.

In the opinion in that case, which was delivered by Circuit Judge Severens, the court said:

"The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the jury be directed to return a verdict for that party. This request having been discussed by the counsel for the respective parties, the

court was proceeding to give its opinion and instructions to the jury, and seemed to indicate, as plaintiff's counsel thought, a purpose to sustain the defendant's request for a positive direction in its favor. Thereupon the court permitted an interruption to allow the plaintiff's counsel to put on file certain requests to instruct the jury, and assured the counsel that he should have the benefit of them, and then, after giving its views at length, directed a verdict for defendant. The requests filed by plaintiff were eighteen in number, the first being as follows:

'(1) Under the pleadings and proofs, you are instructed that your verdict must be for the plaintiff, and the only question for you is as to the amount of damages.'

"The others related to particular matters of law and fact involved in the issue. The court did not comply with any of these requests. The plaintiff excepted to the ruling of the court upon defendant's motion for directing the verdict in its favor, and to the refusal of the court to give the instructions requested in his behalf. Counsel for defendant now urge that the request of each of the parties for a peremptory instruction by the court had the effect of a joint withdrawal of the issues of fact from the jury and a submission of them to the court for its determination, and that, the court having decided them in favor of the defendant, both parties are concluded by the finding, citing *Beuttel* v. *Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654. In that case there was no disputed question of fact, and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication

that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttel* v. *Magone* has been cited in the appellate courts the conditions were the same; there was no disputed question of fact, and there were no special requests. *Merwin* v. *Magone*, 70 Fed., 776 17 C. C. A., 361; *Magone* v. *Origet*, 70 Fed., 778, 17 C. C. A., 363; *Bradley Timber Co.* v. *White*, 121 Fed., 779, 58 C. C. A., 55; *United States* v. *Bishop*, 125 Fed., 181, 60 C. C. A., 123; *Phoenix Ins. Co.* v. *Kerr*, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569.

"In *Beuttell* v. *Magone* it is expressly stated that such request made by the respective parties is not the equivalent of a submission of the case to the court without the intervention of a jury, within the intendment of Rev. St., sections 649, 700 (U. S. Comp. St. 1901, pp. 525, 570). The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor, without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court *pro hac vice* upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the opinion of the court should be that a question for the jury is presented, then to ask that appropriate in-

structions to be given to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in *Beuttell* v. *Magone* to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests."

So far as we have been able to observe, it is true of all of the cases, state and federal, in which this question of waiver where both parties have joined in asking a peremptory instruction alone, arose that each case presented a single issue on the part of the plaintiff, and that an issue of fact triable by the jury; and as we have seen, save and except the decision of the Court of Appeals in this case, in each of that class of cases involving a single issue alone, the rulings have been that where either party at the time of presenting a request for a peremptory instruction also presented a series of instructions to be given to the jury in the event of the denial of the peremptory instruction, the party thereby did not waive the right to go to the jury on the issues of fact.

But in the case at bar, there were and are two issues tendered by the plaintiffs. In the case at bar, from the beginning of the case as made by the petition, the plaintiff claimed a liability on the part of the defendant rail-

way carrier upon two grounds, one on the ground of deviation, without plaintiff's consent, of the shipment from its line running to Topeka and Atchison, to Kansas City, from which point it had no line to Atchison, the other the grounds of negligence aforesaid.

We contended in the Court of Appeals, that the authorities are practically unbroken to the effect that where a shipment is deviated by the carrier, as in the case at bar, without the consent of the shipper, the carrier assumes by such deviation absolute responsibility, and the act of God is no defense in that class of cases.

In our brief in the Court of Appeals in this case, in support of the proposition of absolute liability of the defendant carrier, on the ground of deviation, we cited the following authorities:

Crosby v. *Fitch*, 12 Conn., 410, l. c. 419, 420, 423;
R. R. Co. v. *Beck*, 125 Pa. St., 620;
Phillips v. *Bingham*, 26 Ga., 623;
R. R. Co. v. *Cole*, 68 Ga., 623;
Cassilay v. *Young*, 4 B. Mon., 263;
Sager v. *R. R. Co.*, 31 Me., 228, l. c. 238;
R. R. Co. v. *Washburn*, 22 O. St., 324;
Ex. Co. v. *Smith*, 33 O. St., 511;
Brown Co. v. *R. R. Co.*, 63 Minn., 546;
Hedricks v. *Steamship Co.*, 18 La. Ann., 353;
Hastings v. *Pepper*, 11 Pick., 41;
Proctor v. *R. R. Co.*, 105 Mass., 512;
Ry. Co. v. *Allison*, 59 Tex., 193;
Johnson v. *Ry. Co.*, 33 N. Y., 610, l. c. 611;
Goodrich v. *Thompson*, 44 N. Y., 324;
Maghee v. *R. R. Co.*, 45 N. Y., 514;
Keeney v. *Ry. Co.*, 47 N. Y., 525;
Robertson v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313;

Seavey Co. v. *Union Trans. Co.*, 106 Wis., 394;
Ry. Co. v. *Brichetto*, 72 Miss., 891;
R. R. Co. v. *Odil*, 96 Tenn., 61;
Mer. Dis. Tr. Co. v. *Kahn*, 76 Ill., 520;
Vol. 1, Am. & Eng. Enc. Law (2nd Ed.), 594;
Vol. 5, Am. & Eng. Enc. Law (2nd Ed.), 422, 426;
Hutchinson on Carriers, Secs. 190, 191;
Lawson on Bailments, Sec. 127;
Vol. 6, Cyc. of Law & Procedure, 383, 384;
Marsh v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873;
Ins. Co. v. *LeRoy*, 7 Cranch., 26;
Hostetter v. *Park*, 137 U. S., 30, l. c., 40;
Constable v. *Steamship Co.*, 154 U. S., 51, l. c., 66.

In the Court of Appeals, in our brief in this case, we contended in support of the proposition that in cases like this where the act of God is claimed to be the cause of the result, the carrier is still liable if it is guilty of contributory negligence, operating in connection with the act of God to cause the injury, and in support of that proposition in our brief in the Court of Appeals, we cited the following authorities:

Sweezy v. *Philadelphia*, 64 Pa. St., 106;
Helbling v. *Cemetery Co.*, 201 Pa. St., 171;
Morrison v. *Davis*, 20 Pa. St., l. c. 176, 177;
Williams v. *Grant*, 1 Conn., 487;
Wallace v. *Clayton*, 42 Ga., 443;
R. R. Co. v. *White*, 88 Ga., 805;
Merritt v. *Earle*, 29 N. Y., 115, l. c. 116f;
Michaels v. *R. R. Co.*, 30 N. Y., 564, l. c. 570;
Bibb Broom Corn Co. v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709;
R. R. Co. v. *Curtiss*, 80 Ill., 324;

Wald v. *R. R. Co.*, 162 Ill., 545;
Blodgett v. *Abbott*, 72 Wis., 516;
Nelson v. *Ry. Co.*, 72 Pac. Rep. (Mon. Sup. Ct.), 643, l. c. 651;
Steamboat Co. v. *Tiers*, 24 N. J. Law Rep., 697;
R. R. Co. v. *David*, 6 Heisk, 261;
McGraw v. *R. R. Co.*, 18 W. Va., 361;
Smith v. *Ry. Co.*, 91 Ala., 455, l. c. 456;
Coosa Steamboat Co. v. *Barclay*, 30 Ala., 12, l. c. 127;
Nugent v. *Smith*, 1 C. P. Div., 19 and 423;
Vol. 1 Am. & Eng. Enc. Law (2nd Ed.), 595;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 234;
Hutchinson on Carriers, Secs. 181, 187, 188;
Vol. 6 Cyc. Law & Proced., 377, 384;
Strauss v. *Ry. Co.*, 17 Fed. Rep., 209, l. c. 212;
Caldwell v. *Sou. Ex. Co.*, 4 Fed. Cas. No. 2303, p. 1036;
Thompkins v. *Duchess of Ulster*, 24 Fed. Cas. No. 14087a, p. 32;
Southern Pac. Co. v. *Schoer*, 52 C. C. A., 269, l. c. 274;
Newport News Co. v. *U. S.*, 9 C. C. A., 579;
Clark v. *Barnwell*, 12 How., 272, l. c., 280;
Holladay v. *Kennard*, 12 Wall., 254;
Gleason v. *R. R. Co.*, 140 U. S., 433;
The Majestic, 166 U. S., 376, l. c. 386.

Petitioners further represent, that their counsel in the Court of Appeals in this case, in their brief in support of the proposition that the question of what was the proximate cause of the loss in this case and whether it was the carrier's negligence or whether it was solely the act of God, as claimed by the carrier, were questions of fact for trial by the jury, and in support of that prop-

osition the case of *Milwaukee & St. Paul* v. *Kellogg*, 94 U. S., 469, was cited. And in the brief of counsel of petitioners in the Court of Appeals, in support of the proposition that the questions of negligence in this case were questions of fact to be decided by the jury, the following cases were cited:

> *R. R. Co.* v. *Stout*, 17 Wall., 657, l. c. 653;
> *Ry. Co.* v. *McDonald*, 152 U. S., 662, l. c. 275;
> *Marande* v. *R. R. Co.*, 184 U. S., 173.

It is thus seen that in this case two issues were involved, both in the Court of Appeals and in the trial court, which, as already stated, were the issues of the carrier's liability on the grounds of deviation and negligence. The liability of the carrier in this case on each of those grounds stands separate and wholly apart from its liability on the other ground. The carrier in this case might be liable on the ground of deviation and not liable on the ground of negligence, or it might be liable on the grounds of negligence and not be liable on the ground of deviation. The carrier in this case might be liable on both grounds. The decision in this case of either question of liability, namely, deviation or negligence, is not in the nature of things a decision of the other question.

The question of liability on the ground of deviation was a law question, pure and simple. In this case the deviation was without plaintiffs' consent and without any consultation with plaintiffs. And the question of liability of the defendant carrier in this case on the ground of deviation, being a law question, pure and simple, there was no other way for the petitioners in the trial court to reach and obtain a proper determination of that question except to ask, as they did ask, a peremptory instruction to the jury based on that legal proposition of liability.

Since the questions of negligence were questions of fact, triable by the jury, there was no way under the law, since there was not a waiver of the jury trial in the case, for a decision of the questions of negligence except by the jury. Therefore petitioners in asking the court to give a peremptory instruction to the jury, on the basis of liability founded on deviation and at the same time asking the court to give certain instructions on the propositions of negligence, was simply asking the court to pass upon all of the law questions in the case.

As we have already seen, in the case of *Beuttell* v. *Magone*, 157 U. S., 154, and in the other Court of Appeals cases cited in the opinion of the court in this case, there was but a single issue, but if the rule adjudged by the Court of Appeals in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition of fact, how much more would that result be true in the case at bar, where the liability is claimed on two grounds.

It is undoubtedly true, petitioners say, that while a decision of the case in favor of the plaintiffs on the ground of deviation would absolve the court from the necessity of a decision on the question of negligence, still judgment against the plaintiffs cannot be given in this case without a decision against them of both questions of deviation and negligence. Petitioners had the right to the trial of both issues by the aforesaid tribunals of judge and jury before a final judgment could be given against them. The trial court in this case assumed to decide and did decide both issues of deviation and negligence against the petitioners.

Our contention in the Court of Appeals was, that the decision of the trial court on the question of deviation was against the unbroken authorities applicable to the question of deviation in such cases, and that the

trial court, in taking the case from the jury on the questions of negligence, usurped the province of the jury. However, the Court of Appeals practically refused to decide either question of deviation or negligence, because, as held by the Court of Appeals, petitioners had lost their right as litigants in the case by asking the trial court to decide all the law questions in the case arising on both issues. If the rule sanctioned by the Court of Appeals in this case becomes the rule applicable to all such cases, it would seem that the result would follow that because a litigant in the trial court asks the court to decide all the law questions in the case, the Court of Appeals on becoming possessed of the case will be prevented from saying anything more in an opinion in the case than if without any consideration of the case the word "affirmed" only were written therein.

In view of the conflict between the decision of this Court of Appeals in this case and the other decisions referred to, state and federal, we submit that in harmony with the decision of this court in *Forsythe* v. *Hammond*, 166 U. S., 506, the writ of *certiorari* prayed for by this petition is the proper remedy to settle the conflict made by this decision. If the decision of the Court of Appeals in this case on this question of practice is correct and is important to every litigant and lawyer in this country, this court ought, we submit, to grant this writ of *certiorari* and on the hearing of this case overrule the decisions of the other Circuit Courts of Appeals with which the decision in this case is in conflict. If, on the other hand, this court is of opinion that the decisions referred to of the other Circuit Courts of Appeals and of the Court of Appeals of New York are correct, then we submit that this court on the hearing of this case should so decide, in order to settle the conflict. A duly certified copy of the entire record in this cause in said Court of Appeals, and

the number of uncertified copies required by the rules of this court, accompany this petition and are filed herewith as a part of this petition.

Petitioners pray this court to grant the writ of *certiorari* herein to said Circuit Court of Appeals of the Eighth Circuit and on the hearing and decision of this case by this court that this court will reverse the decisions and judgments of the said Circuit Court and of the said Circuit Court of Appeals herein and remand this case to the Circuit Court for a new trial on both the issues of deviation and negligence.

JAMES S. BOTSFORD AND
R. E. BALL,
Attorneys for Petitioners.

State of Missouri, County of Jackson, ss.

James S. Botsford, being duly sworn, on his oath states, that he is one of the attorneys of petitioners in this case, and has been in both the Circuit Court and the Court of Appeals; that he has read the foregoing petition and that the matters set forth therein are true, as he verily believes.

JAMES S. BOTSFORD.

Sworn to and subscribed before me this 14th day of December, 1906.

My commission expires November 26, 1908.

VINNIE A. THOMAS,
(Seal) *Notary Public.*

Office Supreme Court, U.
FILED.
FEB 26 1908
JAMES H. McKENNEY

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY, ET AL., *Petitioners,*
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*
No. 178.

MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,*
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*
No. 179.

PLAINTIFFS' REPLY BRIEF.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al.
R. E. BALL,
Attorney for Minnesota and Dakota Cattle Company,
Petitioners.

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PLAINTIFFS' REPLY BRIEF.

The petitioners in these two cases desire to submit to the court the record, and to have the court pass upon the question which is the central question in the case, whether the trial court committed error in declaring as a matter of law on the whole evidence, that the case should not have been submitted to the jury. The record comprises some seven hundred pages.

There are some things in the respondent's brief which we naturally resent. The composer of the parts of

the brief to which we now refer has seen fit, in divers and frequent instances, to exhibit his notions of professional gentility, by casting personal imputations upon the counsel for the plaintiff; and not content with pointing out the errors of plaintiffs' contentions, if such there should be, deems it within his duty to impugn their integrity and charge them with intentional misrepresentation and garbling of the proof. At page 3 of the brief, it is said: "Telegrams concerning these shipments were seemingly jumbled together by plaintiffs to create confusion. * * * It will be putting a premium upon an unfair practice, if this court were to accept such statements, and because of the confusion thus created and the garbling of evidence or facts, hold, therefore, that the case should have been submitted to the jury." Again, at page 84, we are accused of "juggling the telegrams to make it appear that Mr. Hurley was not acting in good faith, and counsel try to pervert the language used so as to make it appear that said Hurley, etc." * * * "Such juggling of evidence is not fair to court or counsel." * * * "It is not a candid, straightforward construction of the telegrams."

Then again (brief, p. 158), referring to the explicit recital of the bond (Rec., p. 19), on which this defendant grounded a cross-action for the expenses incurred at Kansas City and in the subsequent pasturage of the remnant of the cattle, which recital shows that all of said shipments were originally routed via Atchison and not Kansas City, we are treated to the decent and generous inquiry as to whether it was not "slipped into the bond by the astute counsel for the Cattle Company, in expectation of making some evidence on this point." The point is, if you cannot answer the argument, abuse the plaintiffs' attorney.

We mention these things only to resent them and because resentment is due. We had not heretofore supposed that it was necessary to try the counsel instead of the case, or to resort to such tactics in order to expose a fallacy or to establish a sound position. In this record, voluminous as it is, we had thought and think that there ought not to be any personal reflections by counsel on the one side against counsel on the other. It so happens that we are in a better position to know about the good faith of our contentions than are our opponents. The lawyer who makes a contention in bad faith, and with the purpose of confusing the issues and attempting to deceive the court, is always reprehensible. We respectfully decline to enact that role or to submit without protest to the accusation of having done so.

I.

As to the telegraphic orders concerning the movement of these trains.

Throughout the brief of the defendant the contention is made that the plaintiff has juggled and confused the telegrams, with the purpose and intent of attempting to fool the court into holding that the case ought to have been sent to the jury, contrary to the ruling of the trial court. We are charged with jumbling the telegrams. Counsel overlooked and paid no attention to the fact that all of these telegrams relative to the movement of these trains were wholly and solely within their control. In their brief they treat the matter as if the plaintiff had these telegrams and had put them in evidence in a designedly confused way, the purpose of confusing being to deceive the court.

If the court will refer to the stipulation in regard to these telegrams, printed at page 178 of the record,

it will see how unjust and unfair is the inference drawn by defendant's counsel. Naturally and necessarily, all of the wires or telegrams which passed between the defendant company and other connecting railroads were in the possession of the defendant. Naturally and necessarily the plaintiffs in this case could not get any of these telegrams until they were produced on demand, by the defendant. A call for all of the telegrams was made by the plaintiffs, and, as a result of that, the stipulation shown at page 178 of the record, was entered into. That stipulation showed that what purported to be a rescript of the telegrams was furnished by the defendant railroad company. It also showed that the counsel for the company agreed to have endorsed on the copies of said telegrams, the hours when they were respectively sent or received. The confusion in the order of the submission of the telegrams, and they are confused, is due entirely to the copies which the railroad company presented, and the form in which they did present them.

The court will not overlook the fact that the pledge of the stipulation by the railway company, to give the hours, or note the hours, of the time of the receipt by it of the different wires, was not complied with by it. The plaintiffs in these cases could not help that.

Mr. Hurley, who is now general manager of the defendant company, and at that time was superintendent of the Eastern Division of the Santa Fe System, extending from Emporia to Chicago, says, at page 212:

> Q. You aimed to give to the counsel of the road all of the wires pertaining to the movement of this stock, did you not?
>
> A. I didn't know that the counsel of our road had gotten those telegrams. I don't know yet how they got them, as far as I am concerned. They didn't ask me.

Q. As far as you were personally concerned?

A. Yes, sir.

Q. You don't know whether there was any other advice, except as contained in those telegrams, which were read?

A. *I couldn't recite the language of some of the telegrams, but my memory is that we did have more telegrams. I think I know of more.*

Q. If you do, where are they?

A. They must be in my office.

Q. Did you look for them?

A. I have not looked for them; I have not been told I needed them or any telegrams in this case.

Q. You don't mean to say you left the file of telegrams, furnished counsel, incomplete?

A. I mean to tell you I don't know how counsel got those telegrams, as far as I am concerned. They never got them from me personally, and I don't know.

Q. You don't know where they did get them?

A. No, sir.

Q. And in any selection which ones would go in and which ones wouldn't go?

A. I couldn't tell you, as long as I didn't furnish them.

Q. You have not since been asked to produce any additional or other telegrams than this batch we have had here?

A. At Topeka, when yourself and Judge Botsford and Mr. Hurd were questioning me, it was agreed I believe, certain accepted telegrams would be sent to show the hour and minute of the transmission of these telegrams. I had not heard anything about it personally since. It is possible that our counsel may have gone to my office for that information, but, personally, I don't know anything about it. He has not called on me for it.

Q. Referring to your last answer, do you not recollect that this transcript of this bunch of telegrams we have read here today was left there at Mr. Hurd's office for the purpose of having those hours and minutes put on by you, or some of your office force?

A. Really I haven't any recollection whether they were left or not. I recollect that it was decided that you would leave them with me.

Q. At any rate, they were not sent to your office, as far as you know, for that purpose?

A. As far as I know; I don't know.

Now, if the court please, is it just or fair where the central question is whether the court should direct a verdict as a matter of law on the whole testimony, for the railroad company to charge the plaintiffs with jumbling these telegrams? The frankest and fairest and most straightforward officer of the defendant company said that they did not furnish us with all of the telegrams. He said that he remembered of other dispatches. The court will appreciate that we had no means of obtaining, for use in evidence, these telegrams, except as they might be produced by the defendant company.

We have abstained heretofore from inferring that any wires relative to the movement of these trains had been withheld or suppressed. It is plain, from this record, that the pledge of having entered on the defendant's telegrams the hour and minute of their receipt was not complied with. It is also plain from Mr. Hurley's testimony that not all of the telegrams were produced. Why were they not? Who is responsible for the alleged confusion? Who was interested in not frankly producing the entire telegraphic correspondence pertaining to these shipments?

The copies of telegrams produced by the defendant are in printed record, 179-195. In the main they

are arranged from day to day, but the arrangement of them was made by the defendant, and not by the plaintiffs. The hour and minute of their sending and recepit was never entered on the copies, as it was stipulated should be done by the stipulation at page 178. They did not produce all of the telegrams relating to these shipments, as they were required to do. In the whole list there is not a one that pertains to the alteration of the freight rate, made necessary by the fact that the Santa Fe was undertaking to turn over the shipments to a connecting carrier at Kansas City, instead of at Atchison, as required by the original shipping contract and way bills. There is nothing in the proof as to what correspondence took place between the Santa Fe road and the Missouri Pacific and the Burlington, relative to the altered condition. It is not reasonable to suppose that there was no correspondence between these railroads on that subject. We repeat what we said in our former brief, that no railroad would haul the cattle from Kansas City to Omaha for the same proportion of the freight rate that would be charged for hauling them from Atchison to Omaha. The dispatches furnished omit very conspicuously any reference to this point, and, taken in connection with Mr. Hurley's statement that there were other telegrams relating to the matter, we submit that it is not an unfair deduction that the railroad company did not produce all of the telegrams called for. If there was any testimony suppressed, certainly the inference ought not to be drawn against the plaintiffs.

II.

The diversion of the shipments from the main line to Kansas City was solely the act of the defendant railway company.

There is a great deal of talk at one place and another in defendant's brief to the effect that Mr. Frost, of the Empire Cattle Company, requested and favored the idea of the diversion of the shipments. There is no such claim made in reference to the trains of the Minnesota & Dakota Cattle Company. The unfairness of this contention is again made apparent by reference to Mr. Hurley's testimony, at page 195:

Q. Do you know Mr. Frost?

A. I do not—never met him. No, sir.

Q. Do you know Mr. Mullen, the president of the Minnesota & Daokta Cattle Company?

A. I do not.

Q. You had no communication with him, in making these orders and sending these telegrams, did you?

A. No, sir, I did not.

Q. Or with anybody representing the plaintiffs in either of these cases?

A. No, sir.

Q. These orders you made on your own motion, didn't you?

A. Yes, sir; that is right.

Q. All of which was done by you, or any of your subordinates, in respect to the movement of these trains, and was done of your own motion?

A. Yes, sir; that is right.

Again, Mr. Hurley says, Record, 203:

Q. Is that what you immediately attempted to do, upon being notified by the Burlington that they couldn't receive the stock?

A. Yes, sir; it was my aim and intention to move not only the stock, but all sorts of traffic that the Atchison, Topeka & Santa Fe Railway Company had to their destination by using any line we could have use of in divergence or detouring, in case it was from a point on our line to a point on another line.

Stube, who was with the Minnesota & Dakota Cattle Company cattle, says of his arrival in Kansas City:

When I got near the yards, I said: "Well, we have got to Atchison at last;" and a man said "Kansas City, you mean."

Q. That was the first you knew of it?

A. Yes, sir. (Record, 407.)

It is apparent from the foregoing testimony that there was no consultation with the plaintiffs or their representatives and no acquiescence by them in the diversion of the shipments, and whatever the fact may amount to, it is made perfectly certain that the order of diversion was solely that of the railroad company.

III.

There was no delivery of the cattle to the Missouri Pacific Railroad.

The contention on the part of the railroad company in their brief in this regard enlarges very much over what they set up in their answers in the two cases. In the Empire State Cattle Company case they do not claim in their answer that they delivered the cattle to the Missouri Pacific Railroad Company, although they do claim that they had arranged with that company to make such delivery. In the Minnesota & Dakota Cattle Company case they claim in their answer that they had the same arrangement with the Missouri Pacific, and, in fact, delivered twenty cars to the Missouri Pacific.

In their brief (page 43), they claim that the cattle were delivered to the Missouri Pacific road to be forwarded, and that they were thereupon relieved from all responsibility for the shipments.

At pages 169 to 172 of our original brief we have set forth the telegrams showing that this contention about the delivery of the stock to the Missouri Pacific is entirely untrue. It is true that Mr. Hurley wired the Missouri Pacific, as stated in their brief, that he had loaded the stock on the faith of the Missouri Pacific taking it. It is also true that on the same day (Rec., 189) he wired his superintendent, McClelland, at Topeka: "I have told Fox to load stock held at Strong City and Wellington, which amounts to 100 cars, K. C. St. J. & C. B. now advise they are open and can accept it. If anything arises so they cannot accept it, before it reaches Kansas City, deliver to Missouri Pacific."

This wire shows that primarily the defendant intended after loading and ordering forward these trains of cattle, to deliver them to the Burlington at Kansas City; and the court will see by the testimony of Kendrick, agent of the Burlington at Kansas City (Rec., 283) that that road was ready and prepared to take these cattle out at Kansas City, and was not permitted to do so by the defendant.

We charge, as one of the acts of negligence on the part of the defendant, that from Friday, the 29th, until the culmination of the flood on Sunday morning, the 31st of May, the defendant fooled away the opportunity to get these cattle out of this valley, and did so by reason of attempting to deal at the same time with the Burlington and the Missouri Pacific. By the defendant's own act they had brought these cattle in here to Kansas City, a point away from the original line of transportation. By that act the defendant deranged the

original contract of shipment and apportionment of the freight rate. In order to get that re-arranged, they consumed so much time that the cattle were, by their fault, caught in the flood.

But the most astonishing contention of fact which the defendant makes, is that these cattle were delivered to the Missouri Pacific, and that when the defendant turned them in to the stock yards, it was entirely exonerated from any further responsibility in regard to them.

Mr. Roberts, local live stock agent of the Santa Fe, says that the way bills for these cattle were not delivered to any connecting line, and says, Rec., 469:

> Q. So that these way bills were not delivered to any connecting carrier at Kansas City, were they?
>
> A. Not that I know of; no, sir.
>
> Q. You found them there in your office after the flood went down?
>
> A. They were found there; yes, sir.

In the stipulation (Rec., 528) introduced by defendant to support its cross-action in the Minnesota & Dakota Cattle Company case, it is recited as follows:

> It is agreed in this case that the defendant was compelled to pay out and did pay out on account of plaintiff's cattle, at the stock yards at Kansas City, $2,428.60, and at Emporia, $2,820.38.

Now, why, we again ask, should the railroad company be in any position to say on the record in this case, that it had no further responsibility for these cattle, after turning them in to the stock yards at Kansas City, when, in this same case, they sue for a large amount of money, which they claim they were compelled to pay and did pay to the Stock Yards Company? How can they at one and the same time assert that they are wholly

exonerated from any responsibility for the cattle, and yet be heard to sue on the basis that they are responsible and because of that responsibility had to pay the Stock Yards Company? Why should the defendant be compelled to pay anything, if in truth it had delivered the cattle to the Missouri Pacific? We refer the court to pages 183-184 of our original brief.

At page 86 of defendant's brief, referring to the testimony of Mr. Douthitt, general live stock agent of the Missouri Pacific, defendant states that his evidence that no cattle were delivered only proves the reckless manner in which he was willing to testify. It appears that in discussing the question of whether the court ought to have declared, as a matter of law, that there was no case made, defendant's counsel has seemed to think it necessary to assault the integrity of the witness. Mr. Douthitt was the highest officer, as the record shows, of the Missouri Pacific Railroad Company, in control of their live stock business and of the shipments of stock received by them from connecting carriers. He stated, as a fact, that the Missouri Pacific did not receive for shipment any of these cattle; that none of the way bills were delivered to him or to his office, and that none or any of the customary things looking to delivery were done in this case; but, because he told the truth about it, and because there is no answer to the facts which he stated, the defendant resorts to the expedient of denouncing him as being willing to testify to anything that may be desired.

The defendant on the record, in which it seeks to recover several thousands of dollars of expense and to recover it on the assertion and basis that the cattle were in its custody, and it was compelled, therefore, to pay out the money sued for, is still willing and does contend that the cattle were not in its custody and it was

not obligated to pay out anything, and was not further responsible for the cattle after delivery to the stock yards. It contends this, notwithstanding its pleading, notwithstanding the bond taken, notwithstanding the fact that it shipped the remnant of the cattle out to Emporia, pastured them for a month or so and then forwarded them on their original way bills to their destination.

In the face of this testimony of Douthitt and in spite of the evidence of its own live stock agent, that the way bills were still in defendant's own office and found there after the flood, it is still boldly asserted in the defendant's brief (p. 86): "It is conclusively shown by the testimony of those who delivered to Mr. Isitt, the Missouri Pacific freight agent who received that one train load of cattle in the yards, together with the way bills, was delivered to the Pacific road in its yard." This is a misstatement of the testimony. What Isitt calls an interchange slip, he explains fully (Rec., p. 633), and finally states, in answer to the pointed inquiry:

> Q. It does not indicate anything then, in reference to whether your line has accepted for further transportation to another point those cars or not?
>
> A. Not at all.

As we have heretofore pointed out (plaintiff's brief, 179 and following), nothing was done with these twenty car loads of cattle, except to run them to the Missouri Pacific chutes, there unload them and then drive them through the alleys back to the shipping division where all the rest of the cattle were. There was no delivery to the so-called connecting carrier at all, and not until after this litigation commenced was there any pretense or contention of such delivery. The whole course of the defendant in respect to the cattle is absolutely inconsistent with such a contention. It brought the cattle into

Kansas City of its own motion; it recognized and was bound to recognize that they were still in its custody; it paid several thousand dollars of expenses and could only have paid that for the reason that they did remain in the defendant's custody; it took what was left of them out of the yards for the same reason, and pastured them near Emporia, at its own expense, for the same reason; and after they had attained sufficient strength to endure further shipment, the defendant forwarded them on the same identical way bills, and under the same shipping contract under which they had originally been received. All this talk about delivering them to the Missouri Pacific at Kansas City or to the Stock Yards Company for the Missouri Pacific, and thereby acquitting the defendant of all further responsibility in the matter, is simply ridiculous.

IV.

The defendant and its managing officers should have anticipated the heavy rise of Sunday morning, May 31st.

Repeatedly, in the course of the brief, attention is called to the undoubted fact of the great devastation wrought in the Kaw Valley at Kansas City by that flood. Much emphasis is laid on certain portions of the testimony of Mr. Connor of the Weather Bureau, as tending to show that this great rise could not have been anticipated. Italics are extensively employed in reciting that residents of Kansas City, business people and others, did not know of the coming of this heavy rise, and our reference to it as a tidal wave is scouted as a fable. Is this defendant and its conduct to be measured by the same standard as would be a resident or store-keeper in the Kaw Valley, living or doing business at Kansas

City? Is there no difference between the two in respect of their circumstances and ability and duty to know the conditions? All the orders moving these trains emanated from defendant's head offices at Topeka, Kansas. Is the responsibility of the great transportation line, with its head offices at Topeka, on the Kaw River, sixty-five miles above Kansas City, precisely the same as that of a store-keeper or a restaurant man on State Line Street, in Kansas City? This defendant had better facilities for knowing that this heavy rise, which reached Kansas City Sunday morning, the 31st, was coming, than even the weather bureau. Mr. Child, general supply agent of the Stock Yards Company, who was called by the defendant, testifies, page 537:

> Q. Do you know, Mr. Child, where that flood water came from? That is, I mean to say whether it came from beyond Manhattan or from beyond Topeka?
>
> A. From reading since, I am satisfied that it came from beyond Manhattan. * * *
>
> Q. All that volume of water, which you attribute this rise to, went into the Kaw River the other side of Manhattan, and necessarily would have to pass Manhattan?
>
> A. Yes, sir.
>
> Q. And the same is true of Topeka?
>
> A. Yes, sir.

He says also that communication with Topeka, and even with Manhattan, was open up until Sunday, but that during Sunday they got no reports at all.

> Q. I know, but before Sunday. It took the flood forty hours to get to Kansas City from Manhattan?
>
> A. Yes, the day before and all I could do and that is to give you the reports I did get. There was nothing alarming in them. The telegrams will show for themselves in that.

Q. There was communication, was there not?
A. Communication up to Sunday morning.

Then, on being requested, Mr. Child produced two telegrams from Topeka (Rec., 538), the last of which appears to have been sent at 8:10 p. m., Saturday. So that the facts from this record not only tend to show, but conclusively show, that this heavy rise entered the Kaw River beyond Manhattan, Kansas, from the tributaries of that river; that its rate of movement would take it forty hours to reach Kansas City, and Mr. Connor of the weather bureau, at page 311, gives the rate at which the crest of the flood moved, as being 2.6 miles an hour, and computed that it would take it thirty hours to come from Topeka to Kansas City. The fact cannot be sneered or asserted out of existence that this great volume of water passed the offices of the defendant company at Topeka during the night of Friday, the 29th. The fact cannot be denied that certainly, up until Sunday, the Topeka wires were open. If the officers of the defendant company did not know of the passage of this heavy rise, they certainly should have known of it. They argue this question as if this nine or ten feet of water had dropped out of the skies right at Kansas City; they take their denial of all knowledge of its coming as being a complete defense to the plaintiffs' charge of negligence on the part of the company in that respect.

We submit that it is not a complete defense or any defense. We submit that the evidence should be viewed, not with reference to the circumstances that surrounded private persons and business men in the flooded district at Kansas City, but with reference to the circumstances surrounding the officers of the defendant company, their facilities and opportunities of knowing, their actual knowledge of the flood Friday morning,

and their keeping in touch with the condition of the river along defendant's railroad above Kansas City, and their duty and responsibility in handling these trains of live stock.

It is no answer to this contention for the chief official to say he did not in fact know about this rise coming until it arrived at Kansas City, and within two or three hours raised the Kaw River some ten feet clear across its valley. It is no answer to the charge of negligence in running these trains into this valley ahead of this flood, which was done demonstratably after this heavy rise had passed Topeka, to say, as Mr. Hurley does say, that he was anxious to forward these shipments to their destination and that was why he ordered them in to Kansas City. It would have cost more, of course, to have retained the cattle on the highlands of Kansas, but it would not have cost anything like what it eventually did cost by reason of the reckless and negligent act of hauling nearly one hundred thousand dollars worth of live stock into the valley and unloading it near the mouth of the river and in front of this devastating flood. It seems to us that nothing could have excused the orders of Mr. Hurley, with reference to the forwarding of these trains from Strong City and Wellington, except he had a reasonable certainty of being able to get them away from Kansas City. This he did not have and knew that he did not, as is shown by his wire (Rec., 189) to the superintendent at Topeka, in which he says:

> I have told Fox to load stock held at Strong City and Wellington, which amounts to 100 cars. K. C. St. J. & C. B. now advise us they are open and can accept it. If anything arises so they cannot accept it before it reaches Kansas City, deliver to Missouri Pacific.

It is true this wire was sent and is dated May 28th, which was Thursday—the hour is not given; but there was abundant time to stop these trains after the more perilous condition of the river at Kansas City was known, or, by the exercise of reasonable care, could have been known. We cannot but regard the persistence with which the orders were adhered to and carried out, even to the extent of getting into the city over the tracks of another railroad, as being grossly negligent and reckless.

V.

The act of driving these cattle into the overhead viaducts was one of the greatest folly and negligence.

There are many grossly inaccurate statements of fact contained in the brief. It is mentioned in one place that thousands of sheep and hogs and cattle were drowned in the stock yards. There is not a word of testimony to sustain that statement. On the contrary, if such a thing had been true, it is not supposable that the evidence of it would have been overlooked. The testimony shows that, aside from these cattle, there was another small bunch which likewise was put up in the viaducts, and, aside from this live stock, there was no evidence that any live thing, man or beast, was lost in the stock yards by that flood.

It is iterated and reiterated that these were wild Texas cattle, and therefore it would have been a hazardous matter to drive them some half a mile to the highlands. There is not a word of testimony to show that the cattle were of any such character, and, whether they were or not, they would not have starved and died or been lost, if they had been taken to the high-

lands. As we have heretofore pointed out, even on Sunday morning, the men of the mule market took about seven hundred mules to the hills, which were penned immediately across the alley from the shipping division where these cattle were penned.

The evidence of Stube, of the Minnesota Company, who stopped at a hotel immediately adjacent to the yards, shows that these cattle were up in the viaducts when he arose Sunday morning. This fact itself shows that the submergence of the yards was, in fact, anticipated some hours before it occurred. We submit that it is not true, as a matter of law, that the act of driving these cattle into those overhead viaducts, instead of taking them to the highlands, was not a negligect act. On the contrary, it seems to us it was most negligent as a matter of fact. It was plain that they could not be fed there. Neither is it a fair criterion to compare the conduct of the railroad in this respect, or in respect to these cattle, with its conduct in regard to the carloads of dead freight. A very different difficulty confronted the defendant company and other roads in respect to carloads of dead freight from what confronted them in regard to live stock.

The cases cited from Missouri and Kansas have no bearing or tendency toward showing that the railroad company was not negligent in respect to these cattle. In the first place, it will not be assumed that the evidence of those records is the same as the evidence in this; in the second place, they concerned property that could not walk. There was no showing in any of those cases that any transportation facilities at all adequate existed to save the merchandise in those cars, or the property in the stores and houses located in the Kaw Valley. It will not do, we submit, and is not fair to generalize and assume that because the railroad tracks did not run up

over the surrounding hills, therefore the company was not negligent in failing to drive these live animals out of that valley.

Again in the cases cited, the shipments in question were destined and routed to or through Kansas City, which was not the case here. Again in the cases cited, there was no opportunity to move the stuff out by a connecting carrier, whereas in this case, in spite of asseverations to the contrary, there was such opportunity.

Kendrick, the Burlington man, certainly cannot be accused, as Mr. Douthitt, of the Missouri Pacific, was accused, of being willing to testify to anything. On the contrary, if the court will read his testimony it will appear that he was rather reluctant; but it will also appear that as the man in charge of the Burlington business at the stock yards, he was expecting to take these cattle. It will appear that he was surprised when the Santa Fe office advised him (wrongly, as we have seen), that the Missouri Pacific was going to take the cattle. He took the pains of personally confirming that, by telephoning defendant's Argentine office.

Of the 142 cars which defendant's counsel insistently claimed they had arranged with the Missouri Pacific to take at Kansas City, the only portion of the 42 cars which had arrived had been turned over to the Burlington. He had the cars and the engines and was accessible to the highest part of the yards, which the Missouri Pacific was not, and the facilities of the Burlington are shown by the fact that Mr. Kendrick sent out thirty-five cars over that road as late as 6:00 o'clock Saturday evening, the 30th.

They try to escape this by saying that that train went East. It would have made little matter to these plaintiffs in view of flood conditions at Kansas City what

direction the railroad took in getting those cattle out of that valley and away from danger.

Mr. Stube testifies, as we have cited in the original brief, that he personally told the man in charge of the defendant's office, on Saturday morning, that the Burlington was ready to take the cattle out, and the answer he received was, "The Missouri Pacific will take your cattle out."

VI.

Summary and Resume.

Counsel for the railway company, at the bottom of page 2 of their brief, cite a couple of cases as authorities in their favor, one against the Missouri Pacific Railway Company, and the other against the St. Louis & San Francisco Railway Company.

It is proper to observe, respecting those two cases, that neither of those two companies have lines in the Kaw Valley. The flood in this case was a Kaw Valley flood. Those two railways touch the Kaw River at Kansas City, and the Missouri Pacific Railway has an unimportant branch extending from its Southern Kansas railway, up to Topeka, but, as already indicated, neither of the railways of the Missouri Pacific Railway Company or the St. Louis & San Francisco Railway Company run parallel with or in the valley of the Kaw River.

Of course, it requires no argument to demonstrate that neither the head officers nor the operating servants of either of those railway companies could have such extensive knowledge of the rise and development of the Kaw Valley flood in this case, as was had by the head officers and the employes of the defendant railway company, for nearly a week before the climax of

that flood on Sunday, May 31, 1903. The testimony of Mr. Hurley, Mr. Cafferty and Mr. McClelland, who were either general or division officers of the defendant railway company, with headquarters at Topeka, show that all of the lines of the defendant railway company in the eastern part of the State of Kansas were flooded early in the morning of Friday, May 29, 1903, and out of operation, and that they knew those facts. Their lines had been in that condition for eight hours before the transit of these cattle of the plaintiffs was resumed, Friday at two o'clock, at Strong City.

Again, in another part of the brief of the railway company's counsel in this case, it is suggested and sought to be demonstrated by the arguments which counsel employs, that it was not negligence to drive these $100,000 worth of cattle up on the viaducts in the stock yards, because, as is argued, the railway company, or the stock yards company (which is the same thing, because the stock yards company was the bailee of the defendant railway company), had the right to suppose that the flood would subside within a few hours after its climax, so that the cattle might be taken down from the viaducts.

It seems to us that this is a strange argument and a very singular sort of logic. It took a month for this flood to rise to its climax, and as conditions existed on that Sunday morning when these cattle, instead of being driven up on the uplands, were driven upon those viaducts, the situation was such as to warrant a man of the most ordinary prudence to believe that it would take days and days, as it did take, for the flood to sufficiently subside so that the cattle could be taken down from those viaducts. In driving the cattle up on the viaducts, they were driven to certain death. Nothing was more, or could be more, inevitable than that result. The

only wonder is that the whole of the two herds did not perish. Besides, the condition of the water in the Missouri river at Kansas City at the point where the waters of the Kaw empty into the Missouri, was such at that time, as to convey the idea to a child, even, that the Kaw River flood could not subside short of a week or ten days, at the outside. Both the Missouri River and the Kaw River at Kansas City, for forty-eight hours before that Sunday morning, were more than bank full.

The strange feature of the brief of the learned counsel of the railway company, as it seems to us, is the persistency with which it is sought to be shown, in contradiction of the overwhelming and uncontradicted facts in the case, that the defendant railway company, upon the question of the anticipation of the flood at Kansas City, stood in the same position as the people at Kansas City.

Reference has already been made quite fully in this brief to that point. But, as a sample of the suggestions made throughout the brief, we call attention to the following sentence at the top of page three of counsel's brief:

> Indeed, it is now a well known historic fact, that this flood at Kansas City was so extraordinary, unprecedented and sudden in its final catastrophe, as not to have been anticipated by the inhabitants in that locality.

The inhabitants of West Kansas City, who live in the valley of the Kaw, are, as is well known, largely made up of the laboring classes, who work from early morn till late at night, in the packing houses and other large industries at Kansas City, and for counsel to suggest and to persistently argue that the people of West Kansas City who live in the valley of the Kaw, could or did, know as much about the flood condition of the

Kaw Valley from Manhattan to the Kaw's mouth, as is shown by the evidence in this case to have been known by defendant, seems to us to evince a closing of the eyes on the part of the learned counsel to the overwhelming evidence and conceded and undeniable facts of the case, which shows that the general officers and employes of the defendant company, with head offices at Topeka, actually knew of the flood for four days before its climax, on May 31st.

Throughout the brief of the learned counsel of the railway company in this case, it seems to be assumed that the law of deviation in this class of cases only applies in cases where there is an express agreement of the parties as to the line of transit which the carrier is to follow in making the shipment.

A perusal of our statement of facts in our other brief and the brief and argument therein, we think, will point out very clearly that there is plenty of evidence in this case to establish that there was an express understanding of these parties that these shipments were to go by way of the main line, through Wellington, Strong City, Topeka and Atchison, where the delivery to a connecting carrier was to be made.

The testimony of Frost and Newton, on the part of the Empire Company, and of Stuby and Mullen on behalf of the Minnesota Company, together with the manner of making up the way bills and shipping contracts, with the endorsements on the back thereof, all show that there was a clear and distinct understanding of these parties that these shipments should go by way of Topeka and Atchison, as above stated. The shippers were paying a through rate for the entire shipment, and the amount of the through rate which they paid for the shipment over the usual route, by way of Wellington, Strong City, Topeka and Atchison, was less

than the through rate would have been, had it been understood by the parties that the shipment was to be made in a round-about way, by way of Kansas City, or some other round-about transit. Besides, Judge Pollock, in his opinion in this case, clearly indicates that he understood the evidence in the case as showing the understanding of the parties as to the line of transit to be by way of Topeka and Atchison, as a reference to his opinion will show.

In addition to that, we have the testimony of Mr. Hurley, the general superintendent of the railway company, given in the most clear, explicit and conclusive manner, that the line of railway of the defendant company from Amarillo north by way of Wellington, Strong City, Topeka and Atchison, was the usual traveled route of those shipments.

Aside, however, from the proposition of there having been the express agreement as to the line of transit in this case, we think the law is well settled, as an examination of the authorities cited in our other brief and argument will show, that even where there is no express agreement on the subject, but there is a usual traveled route and line of transit for such shipments as that made in the given case, then as the courts and law writers say, the shipper and carrier are presumed to contract with reference to that usual route, and the carrier is as much bound in the given case, even though there be no explicit or express agreement on the subject, to take the shipment the usual traveled route, as if there were an express agreement to that effect. And the rule of liability for deviation in such cases is just the same as if there had been an express agreement of the shipper and carrier as to the line of transit.

At several points in defendant's brief it is suggested that plaintiff's agents Frost and Stuebe did not protest

or object against or to the movements of the cattle by defendant railway company, through Supt. Hurley. It was not their part or place to object or except or protest. They were in the position described in Tennyson's poem of the "Light Brigade:"

"Theirs not to reason why,"
"Theirs but to do and die."

The soldiers of Napoleon on the famous and disastrous retreat from Moscow did not object, except or protest. But Napoleon was not then more supreme than was Supt. Hurley in ordering the movements of the cattle in these cases. Counsel suggest that these cattle could not have been left in or taken out of the K. C. stock yards without plaintiff's consent. This is a mistake. Such consent was not thought of or even dreamed of till now. There is nothing in the record or evidence warranting or supporting such a suggestion.

VII.

Additional Authorities.

We desire to call attention at this point to some cases which have come to our attention since the printing of our other brief in this case.

The case of *Fentiman* v. *A. T. & S. F. Ry. Co.*, 98 S. W., 939, is one of those cases. That was decided December 12, 1906, by the Court of Civil Appeals of Texas. The case arose out of this same flood under consideration in this case. The judgment in that case in the trial court was for the defendant, but that judgment, on appeal, was reversed and the case remanded by the Court of Civil Appeals.

It was held in that case that:

> A carrier is liable as an insurer for the loss of goods intrusted to him for transportation, unless

the loss is caused by the act of God, the public enemy, inherent defects in the goods, or negligence of the shipper.

It was further held, that:

Where a shipper, suing a carrier for loss of goods received for transportation, makes out a *prima facie* case by proving that the goods were delivered to the carrier and were destroyed while in its possession, the burden is on the carrier to prove that the goods were destroyed proximately by an act of God, the public enemy, inherent defects in the goods, or negligence of the shipper.

It was further held in that case that:

Where, in an action against a carrier for loss of goods received for transportation, a *prima facie* case of liability is established by proof that the goods were delivered to the carrier and were destroyed while in its possession, the question whether the carrier discharged the burden of proof that the goods were destroyed by an act of God, the public enemy, inherent defects therein, or negligence of the shipper is for the jury, except where the evidence is so overwhelming as to leave no room for a reasonable doubt that the *prima facie* case has been destroyed.

It was also held in that case that:

Where the negligence of one person with reference to a duty he owes to another concurs with an accidental cause, resulting in injury to the latter, the former must answer for the consequence as though his negligence was the sole cause of the injury.

Accordingly it was held by the Court of Civil Appeals of Texas, in that case, that since the evidence showed negligence on the part of the railway company, concurrent with the act of God, the defendant carrier

was liable. This, it will be observed, is contrary to the ruling made by the trial judge in this case, as by reference to his opinion in the record, is seen.

In the opinion in that case, as will be seen by consulting that part of it at pages 940 and 941 (98 S. W. Rep., 940) is a summary of the testimony of Mr. Connor, of the Kansas City Weather Bureau, which he gave in that case. And it will be seen that his testimony from his daily memorandum of the rise and progress of the flood, which he made, is identically the same in the report of the Texas case as is his testimony given from the same memorandum by him in this case. See pages 300-303 of the record herein. We ask the court in this case to compare the testimony of Mr. Connor, as given from that memorandum in that case, with his testimony given in this case, for the reason that upon that same identical testimony, the court in that case held that there was evidence tending to prove negligence such as to authorize and require the submission of the case to the jury.

In the opinion in that case, the Texas Court of Appeals, as a summary of the evidence, uses the following language:

> The flood was caused by one general rise, which began on May 20, 1903, and continued a steady gradual rise from day to day until May 31. Then during the next twenty-four hours occurred an enormous rise of seven and one-half feet.

It would seem that the court in that case found from the evidence, which as we have seen was the same as the evidence in this case, and which involved the same flood and facts; that there was a sort of a tidal wave. However, we have not succeeded in convincing our learned friends on the other side, of the fact of such tidal wave. The evidence shows in this case, that on Thursday and

Friday, growing out of the rains, there was a tidal wave of about eight or ten feet that passed down the Kaw river by Topeka during those days, which tidal wave reached Kansas City during Sunday, or Sunday morning.

It seems that the Court of Civil Appeals of Texas also learned something about that tidal wave. The learned counsel of this same defendant in that case does not seem to have succeeded in convincing the court there that there was no enormous rise amounting to a tidal wave during the three or four days that preceded the climax of the flood on May 31st.

Another case to which we desire to call the court's attention is that of *Warehouse Co.* v. *Missouri, Kansas & Texas Railway Co.*, 124 Mo. App., 545. That was a decision by the St. Louis Court of Appeals, April 30, 1907. That also was a case which grew out of this same flood. The facts of the case took place at St. Louis, on the arrival of this flood down the Missouri and Mississippi rivers, in June, 1903.

In that case the following propositions were ruled by the court:

> A railroad company received a carload of corn for shipment, and, in the usual course, with ordinary diligence, the car would have been taken out of the yards several hours before the occurrence of an unprecedented flood which destroyed it. In an action for the loss of the car, it was a question for the jury whether the railroad company negligently delayed getting the car en route.
>
> Where a railroad company, in order to preserve its main line intact from the ravages of an extraordinary flood, cut an embankment so as to turn the water on its yards whereby they were flooded sooner than they would otherwise have been, the railroad company was negligent and liable for loss

of a car load of freight caused by such premature flooding of the yards.

In order that a common carrier may escape liability for loss of freight, lost through the act of God, the act of God must be the sole cause of the loss; if the carrier's negligent act commingled with the act of God as an active element, the carrier is liable for such loss.

In that case, the trial court refused to give an instruction peremptorily directing the jury to give a verdict for defendant, and the judgment of the trial court based on that refusal, was affirmed by the St. Louis Court of Appeals.

The court in its opinion in that case, which exhaustively considers the subject of negligence in this class of cases, uses the following language (pp. 559-561):

> There is substantial proof of two separate elements of negligence with which the court must reckon. First, it appears as an established fact and uncontroverted in the proof, that the defendant issued its bill of lading for the car of corn in question about 1 o'clock on June 3, and from its own witnesses, it is established by the usual course, the billing of the car would have been communicated to its intermediate office by 4 o'clock that afternoon; that it would be retained there from one to two hours, until proper records were made, and passed on and reach the yard office on the morning of June 4, and therefore, had defendant's agents been ordinarily diligent and passed the bill of lading on, as was the usual course, it would have actually been in the hands of the yard men at the time, and several hours prior to the actual physical receipt of the car at 1:25 on the same day. There is no doubt from the record, in fact it is an uncontroverted fact, that the car was not delivered until 1:25, June 4, and while this is true and defendant could not be liable

for neglect thereabout, until the car was actually received, some one must have been inattentive about the process of forwarding the billing from the commercial office, for it appears the billing was not received in the yard office until the morning of June 5, whereas, ordinary diligence would have placed it there on the morning of June 4, in advance of the car, and in the usual course of handling cars in and transporting them from the yard in an outgoing train, as testified to by the general yardmaster, the car would have gone forward on a train in the course of eight or ten hours after shipping instructions were received from the commercial office, or at least prior to the morning of June 5, or in other words, prior to the delivery of the billing by its intermediate office, to the yard office. So it appears from this that the defendant's agents were inattentive and negligent with respect to their duty in passing the billing on to the yard office, which negligence operated to hold the car in the yards until June 5, when in the usual course it should have been en route to its destination before midnight on June 4. * * * Now, it is well settled law that if the defendant's negligence commingled with and operated as a contributive element proximate to the injury, even though such injury is to some extent and even a paramount injury, operated by the act of God, the defendant will be liable as though its negligence were the entire and sole cause of the loss. In order for the defendant to escape liability under the exemption afforded by the law to the entailments of an act of God, the act of God must be the sole and only cause of the injury and this, too, unmixed with the negligence of the defendant, for if the defendant's negligent act commingled with it in the loss as an active and cooperative element and the loss is proximate thereto, or, in other words, is a reasonable consequence of the negligent act, it is regarded in the law as an act of the carrier rather than as an act of God. The

> principle is manifest from all of the cases and evidence of its proper application abounds in the books. (*Wolf* v. *Amer. Ex. Co.*, 43 Mo., 421-425; *Davis* v. *Railroad*, 89 Mo., 340; *Grier* v. *Railway*, 108 Mo. App., 565; *Prince* v. *St. Louis Cotton Compress Co.*, 112 Mo. App., 49, 86 S. W., 873; *La Mont* v. *Railway*, 9 Heisk (Tenn.) 58; *Moffat Com. Co.* v. *Railroad*, 113 Mo. App., 544.) It seems clear, first, that the negligence of defendant's agents in not advancing the shipping bill and instructions, operated to detain the car in a place which proved to be of peril for many hours after it should have been en route to its destination, if they had been ordinarily diligent.

Another recent decision to which we invite the court's attention is that of the Supreme Court of Alabama, delivered April 20, 1907, in the case of *Ala. Great Southern R. R. Co.* v. *J. Elliott & Son*, 43 So. Rep., 738. The case is also reported in Vol. 65, Central Law Journal, p. 317.

In that case, it appears that a consignment of flour was delivered to the carrier for shipment. It was detained four days before being forwarded. Upon the day of its arrival at its destination, at 1 o'clock P. M., notice of its arrival was sent to the consignee. On the morning of the next day at 1 o'clock a cyclone damaged the goods. And the court on those facts held that the carrier was liable for the damage, since its negligence resulting in the delay at the place of shipment continued to be an active cause until the consignee had a reasonable time after the arrival within which to remove the goods.

According to the doctrine of that case, the defendant railway company in the cases at bar is, we submit, clearly liable for its three days' unnecessary delay of the cattle in question in these cases, at Wellington and Strong

City. According to the doctrine of the Alabama Supreme Court in that case, the delays in the case at bar, at Wellington and Strong City, were the first proximate cause of the damage and injury and to these cattle. The subsequent negligences also contributed.

Respectfully submitted,

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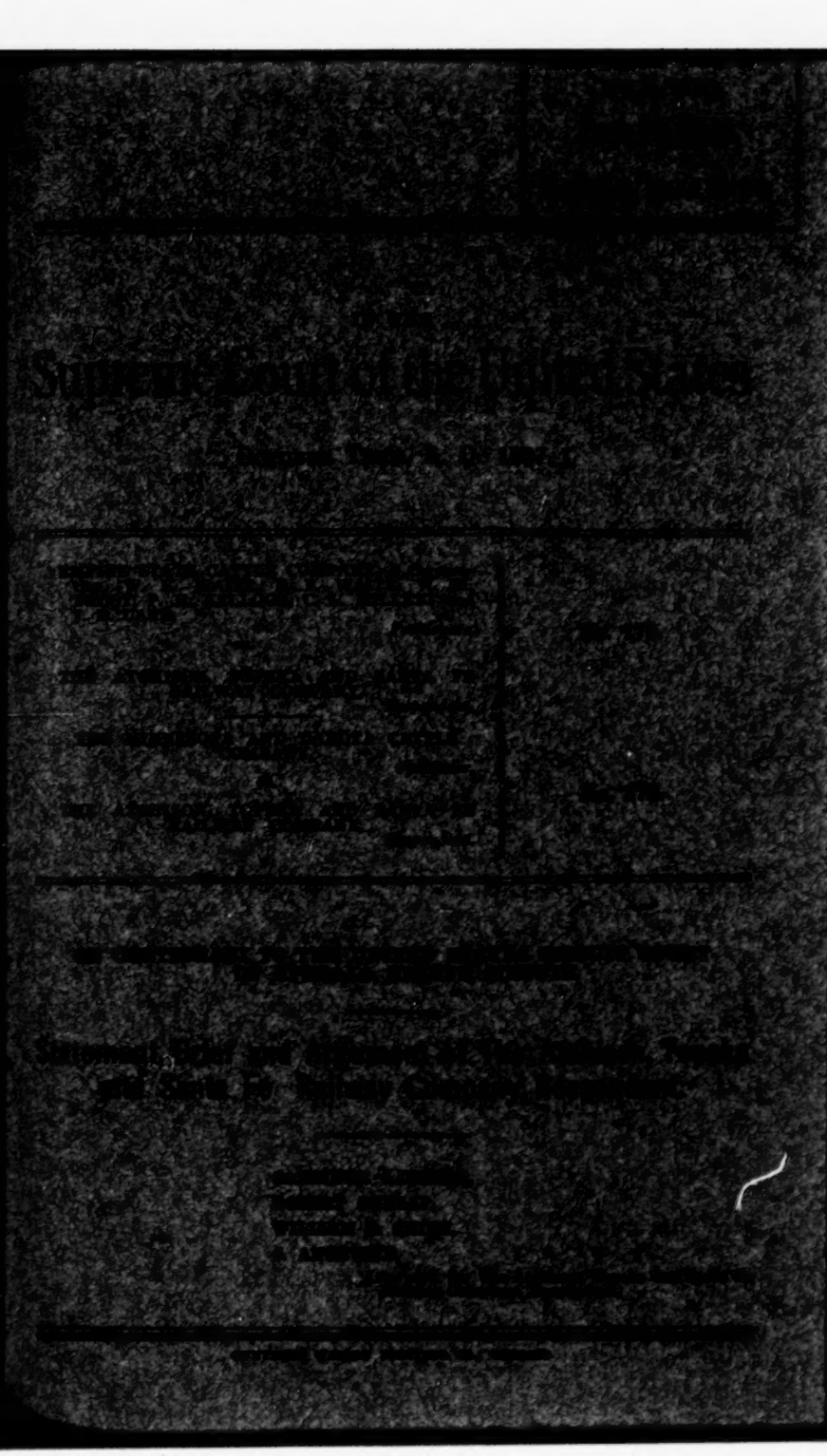

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1907

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,* vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*	No. 178.
THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,* vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*	No. 179.

BRIEF AND ARGUMENT FOR DEFENDANT.

STATEMENT.

The statement of the case made by the petitioners is inaccurate in many respects. Some of the statements are wholly unsupported by any evidence, and others are directly contrary to the evidence. This is particularly true with reference to the main fact as to the character of the flood of May 31st, 1903, in question, and

therefore whether the defendant should have anticipated that it would be so unprecedented and extraordinary at Kansas City as to cause damage to petitioners' cattle in the Union Stock Yards at that point, where the damage complained of was occasioned. The conclusion is repeatedly stated in petitioners' brief that the agents of the Railway Company had notice in ample time and should have anticipated that a flood in the Kaw River would be of such an unprecedented and extraordinary character as it finally proved to be, and that the defendant was consequently negligent either in transporting and placing the stock in the Kansas City Stock Yards or in not removing the same therefrom instead of driving the animals upon the viaducts in those yards after the flood waters had begun to submerge the same. Yet two very respectable courts in that vicinity have held with reference to this very flood and its effects at Kansas City that it was so extraordinary and unpredecented, and its approach and the final result thereof so unexpected, that any reasonable human being in that locality could not be held as negligent for failing to anticipate the same, and that, therefore, a railway company would not be held liable for loss of or damage to freight which was allowed to remain in Kansas City until overtaken by the flood or which was overtaken by the same at that place. (See case of *Rodgers* v. *Missouri Pacific Railway Company*, decided by the Supreme Court of Kansas, February 9, 1907, reported in 88 Pacific Reporter, 885; also the decisions of the Kansas City Court of Appeals in the cases of *Lightfoot* v. *St. L. & S. F. Rld.*, 104 S. W., 483, and *Moffat Commission Company* v. *Union Pacific Rail-*

road Company, 113 Mo. App., 544; s. c., 88 Southwestern Reporter, 117.) Indeed it is now a well-known historical fact that this flood at Kansas City was so extraordinary, unprecedented and sudden in its final catastrophe as not to have been anticipated by the inhabitants in that locality.

The main faults in petitioners' statement, in addition to the unwarranted and unjustifiable conclusions, are that many of the facts are confused whilst others are but statements of half the truth and, therefore, misleading, because if all the facts established by the undisputed and uncontroverted evidence had been clearly stated in chronological order there would be little occasion either for confusion or for erroneous impressions which naturally follow from a statement of but a portion of the facts unexplained and unenlightened by other facts concerning which there was no dispute. Telegrams concerning these shipments were seemingly jumbled together by plaintiffs to create confusion, so that defendant was obliged in its evidence to set them out in order and explain them so as to make them intelligible. If it was hoped that on account of the bulk of the record this court would not have time to review the evidence to verify any of the conclusions or statements made, we respectfully submit that such hope should not be realized, as it would be putting a premium upon an unfair practice if this court were to accept such statements, and, because of the confusion thus created and the garbling of evidence or facts, hold therefore that the case should have been submitted to the jury.

The main question involved was as to the character of this flood at Kansas City. Was it merely of such a character that prudent persons in that locality should have reasonably anticipated before the disaster that it would finally inundate the Kansas City Stock Yards, or was it so unprecedented, sudden and unexpected that the resulting damage could not have been reasonably anticipated? The latter proposition was established beyond reasonable controversy.

According to plaintiff's petition the damage to the cattle was caused by reason of inability to feed and water the same on account of the height of the flood waters at the Kansas City Stock Yards where the cattle were. It was alleged by them that

> "*an unprecedented flood had* commenced in the waters of the Kaw and Missouri Rivers, extending from the source of the Kaw River to its mouth and extending down the Missouri River from its source to the point where said Kaw River empties into said Missouri River."

It was alleged that defendant negligently detained the cattle at Strong City until May 29th; also that on arrival at Kansas City on the morning of May 30th defendant, instead of leaving the cattle on the uplands where they would have been safe from the continued rise in the Kaw River, deposited them in pens near the mouth of the river, at which point in said Kaw River on May 31st the flood reached its climax and extended far back from the ordinary channel of the river so as to fill and cover said pens; that on May 31st

> "defendant, in order to save said cattle from being drowned, drove said 798 head thereof into the viaducts extending over said pens and above the waters which, in consequence of said flood, had

submerged said pens, and that in so driving said cattle into said viaducts defendant mixed and intermingled said 798 head with 2200 head of other cattle that were in said pen at said time, and that said 798 head and 2200 head of other cattle remained on said viaducts from May 31, 1903, to June 7, 1903. * * * *That said waters so made by said flood extended from said May* 31, 1903, *to June* 7, 1903, *back from said pens a distance of three-quarters of a mile and more and were of a depth of from eight to fifteen feet, and that in consequence of said waters and of the placing of said cattle on said viaducts it was impossible to feed and water said cattle in said period of seven days and that, by reason of the location of said cattle and by mixing and intermingling same with said* 2200 *head of other cattle, it was impossible for said plaintiff to feed and water the said* 798 *head of cattle.*"

Defendant's answer denied all charges of negligence and denied any agreement to transport by way of Atchison but alleged that the cattle were shipped under certain written contracts, copies of which were attached to the answer as hereafter stated. It also showed the necessity of taking the cattle by its line to Kansas City instead of to Atchison for delivery to a connecting carrier as originally contemplated by it. It set up specifically that the damage was caused by an extraordinary and unprecedented and sudden rise of the waters of the Kansas River, overflowing the banks thereof and inundating the Kansas City Stock Yards; that the same constituted an act of God, for the consequences of which the defendant was not liable.

The Pecos and Northern Texas Railway Company operates a line of railway from Kenna, N. M., to Amarillo in connection with the Atchison, Topeka and Santa

Fe Railway. The Atchison, Topeka and Santa Fe Railway extends from Amarillo in a northeasterly direction through Oklahoma and Kansas and has two lines reaching the Missouri River, one extending to Kansas City and the other to Atchison, about fifty miles north of Kansas City. The main line extends by way of Topeka to Kansas City and another and shorter line branches off at Emporia and extends by way of Ottawa and Olathe returning to the main line at Holliday, thirteen miles west of Kansas City, and thence over the main line to Kansas City. Atchison is at the terminus of the branch extending from the main line at Topeka to Atchison. The K. C., St. J. & C. B. Ry. Co., commonly called the "Burlington," and The Missouri Pacific Railway Company have lines of railway extending from Kansas City in a northwesterly direction along the Missouri River to Council Bluffs and Omaha, which are on opposite sides of the Missouri River, and each connects with the Atchison, Topeka and Santa Fe Railway at Kansas City and at Atchison. The Chicago, Milwaukee and St. Paul Railway extends from Omaha and Council Bluffs to Evarts, S. D., and connects at Council Bluffs and Omaha with the Missouri Pacific and Burlington roads, respectively.

The defendant had feeding yards at Wellington in Southern Kansas and at Strong City and Emporia in Central Kansas where cattle were unloaded for feed and rest, but it had no such yards between Emporia and Atchison nor at Atchison where stock could be unloaded and kept. Neither did the Burlington Road have such yards at Atchison. (Rec., 173, 199, 200, 477.)

There is a public stock yard at Kansas City which is

one of the largests stock yards in the country, second only to Chicago, at which stock in transit is unloaded for feed and rest and for transfer from one road to another; and where the equipment is not to accompany the cattle the general custom is for the delivering company to deliver the cattle to the Stock Yards Company for the forwarding company, the Stock Yards Company acting as agent for both companies. (Rec., 251, 252, 265, 266, 532, 533, 540, 541, 542, 543, 544, 545.)

On May 25, 1903, the respective plaintiffs or petitioners entered into contracts with The Pecos and Northern Texas Railway Company for the transportation of the cattle in controversy, something over three thousand head, from Kenna, N. M., and Bovina and Hereford, Tex., upon its line, to Evarts, S. D. Several written contracts were executed by the respective shippers and also signed by *"The Pecos and Northern Texas Railway Company and connecting carriers"* in the case of the shipments involved in the case of the Empire State Cattle Company, and by "The Pecos Valley and Northeastern Railway Company *and connecting carriers"* in the case of The Minnesota and Dakota Cattle Company, the Pecos Valley and Northeastern Railway being the line in New Mexico connecting with the Pecos and Northern Texas Railway. These written contracts are set up in the answers of the defendant as being the contracts under which the cattle were shipped and under the Kansas practice are admitted to be true, the execution thereof not being denied under oath. Each contract covered two or more cars. They are all alike except as to the number of cars, number of cattle, names of consignor and con-

signee. Copies of these contracts are contained in the record from pages 12 to 18 as Exhibits A, B and C to the answer in the Empire State Cattle Company Case, and on page 17 of the record in The Minnesota and Dakota Cattle Company Case as Exhibits A to J to the answer in that case. The destination stated in each contract is Evarts, S. D. The entire contract for the shipment of said cattle is contained in said written contracts and each contains the following provisions:

The initial line, called the "Company," acknowledges receipt of the cattle and agrees to transport, upon its own road only, the livestock described, to be carried by said company to the place of destination, if the same be upon the line of road of said company, but if such place of destination be beyond the line of road of said company then to deliver or tender such shipment at a connecting point on the line of its road to the connecting carrier, to be forwarded to the place of destination.

> "FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the

shipper or his or their employes as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence."

"SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employes to work or otherwise, or by failure of machinery, engines or cars, *or injury to tracks or yards, storms, washouts*; * * * the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit."

"TENTH. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company, is the rate fixed by said Company, and the companies or carriers operating the connecting lines of railroad to the point of destination in their tariffs or schedules for similar shipments at owner's risk, under and in view of the limitations and exemptions contained in this agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk:

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and *that each of such carriers shall only be obligated to trans-*

port said stock over its own road and deliver to the next connecting carrier, and the last carrier to the place of destination, under the provisions of this agreement, and no carrier or carriers shall be liable, in any event, for any loss or damage which may occur upon the road or roads, connecting or otherwise, of any other carrier or carriers; that each of the connecting carriers shall transport said stock over its own road under said through rate, in accordance with the provisions of this agreement, and *that this agreement is entered into by the above named Company in its own behalf and as agent, for and, severally and not jointly, on behalf of each of the connecting carriers operating roads forming part of the route over which said stock may be shipped* to the point of destination above mentioned; that no other contract shall be required or be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers as the several contracts between said shipper and each of such carriers respectively, provided for their mutual rights and obligations."

In the twelfth paragraph of the agreement it was distinctly understood that all prior understandings or agreements concerning the transportation of said stock or said shipment were merged and contained in the written agreement,

"and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock."

"THIRTEENTH. In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability, and that he has selected the rate and liability, named herein, and expressly accepts and agrees to all the stipulations herein named."

The entire contract, therefore, for the shipment of the cattle is contained in those written contracts alone, for it was provided in the twelfth paragraph of each,

> *"this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock."*

There is no agreement or provision in said contracts that the cattle should be delivered to the Burlington road or any other particular connecting carrier, or that they were to be taken over any particular route or that they were to be delivered to any particular connecting carrier at any particular connecting point.

There is no evidence outside of the contracts that the shippers or any of them requested that the cattle be routed over any particular connecting route or over any particular connecting line of railroad, or that delivery to a connecting carrier be made at any particular point, and probably such evidence, if offered, would be incompetent as tending to contradict or vary the written contracts. The selection of connecting carriers and the route was left entirely to the initial carrier, The Pecos and Northern Texas Railway Company, and to each connecting carrier which should receive the shipment, the contracts being made on behalf of the initial line and such connecting lines as should receive and transport the shipment. The initial carrier had the right to select any reasonably direct route and designate the connecting carriers, but such designation does not become a part of the contract. It is made after the execution of the contract. In this case the initial carrier, by way bills made out by its station agent and delivered to the

train conductors for their guidance and for the guidance of connecting carriers, routed the cattle by the Atchison, Topeka and Santa Fe Railway to Atchison, the Burlington from Atchison to Council Bluffs and the Milwaukee Road from Council Bluffs to destination at Evarts. Such station agent also made an endorsement or notation on the back of some of the contracts "Hereford to Atchison"; on others his endorsement was "Kenna, N. M., to Evarts, S. D."; on others the endorsements was "Kenna, N. M., to Atchison, Kan."; on others his endorsement was "Bovina, Tex., to Atchison, Kan." (See record in Minnesota and Dakota Cattle Company case, page 19, and endorsement on the copy of contract between pages 16 and 19.)

These "*waybills*" counsel for petitioners, in the face of the record and of the well-known practice of railways, persist in incorrectly designating as "bills of lading." No bills of lading were issued, but the contracts of shipment are those designated as the livestock contracts heretofore mentioned. The "waybills" as stated and as the word itself implies are made out by the initial carrier to accompany the shipment as a guide to train conductors and they are delivered by one conductor to another and from one road to another with the cattle. They are no part of the contract of shipment and the shipper has nothing to do with them and seldom sees them. They are not made out or intended for his use or inspection. The endorsements on the written contracts were made by the initial carrier after the execution of the contracts and were no part thereof, but were put on as mere

notations of certain *points* on the route selected by the initial carrier on behalf of itself and such connecting carriers as should receive the shipment. *They do not designate the lines or routes.*

Under those contracts the cattle were shipped and arrived in due time at Wellington and Strong City, where they were unloaded for feed and rest. As there was no claim made that there was any negligence in handling the cattle prior to their arrival at Wellington and Strong City we will give a brief statement of the shipments prior to the arrival of the cattle at Strong City and a detailed statement of the movement after that time.

Movement of Trains.

The Empire State Cattle Company had two train loads of cattle. The first train in charge of G. W. Cloyd, left Hereford, Texas, on May 25, 1903, about 5:30 P. M. (Rec., 31), and arrived at Strong City on May 26th about 5:30 P. M., when they were unloaded for feed and rest. (Rec., 32.) Mr. Cloyd was notified by the railroad company that his cattle would be reloaded the next morning. (Rec., 35.) The next morning they did commence loading the cattle about 8 o'clock and loaded seven or eight cars (pages 34-35), when the loading was stopped by telegrams announcing that on account of a washout on its line, the Burlington road would not receive the cattle. On that morning, May 27, 1903, at 6:56 A. M. A. T. Perkins, superintendent of the Burlington road, wired J. H. Garside, agent of the defendant road at Atchison as follows:

> "Please notify A. T. & S. F. that on account of washout we cannot accept at Atchison the 20 cars Evarts stock reported to arrive at Atchison 10:30 A. M. and the 22 cars reported to arrive at Atchison about noon; will advise later about third train." (Signed A. T. Perkins.) (Rec., 448, 183.)

That telegram was reported to the defendant's trainmaster at Topeka (page 448), and he notified L. E. McClure, trainmaster at Newton, in whose division Strong City is situated, of the washout, and ordered the loading stopped. (Rec., 183.) He also notified conductor O'Byrne who was at Burlingame with one train load of cattle to take his train back to Emporia (Rec., 182). It was in consequence of these telegrams that the loading was stopped. On the same day, May 27, 1903, at 3:43 P. M. the Burlington road advised the defendant's agents at Atchison, that the Burlington road was repaired and ready for business (Rec., 542). This message was repeated to the trainmaster at Topeka, at 4:02 P. M. and the cattle were again loaded and started from Strong City, as Cloyd testified, on Wednesday, May 27th, about 8:30 P. M., and arrived at their destination on June first. Those cattle are not involved in this suit and are only mentioned because of the claim made that because that train got through, the other cattle would have gotten through but for defendant's negligent delay in forwarding them. Cloyd testified that his train left Strong City on May 27th about 8:30 P. M. (Rec., 32-35), and Mr. Carr testified that they arrived at Evarts on June first, making five days from Strong City to Evarts. (Rec., 177.) Mr. Cloyd testified that he was not caught in the flood, but he did not testify as to the

route taken from Strong City, or that he went by way of Atchison, or by way of the Burlington road. The running time for stock trains from Strong City to Atchison is eight and one half or nine hours. (Rec., 176.) If Cloyd's train left Strong City at 8:30 P. M. on May 27th, it should arrive at Atchison on May 28th about five or six o'clock A. M. But on that morning, May 28, 1903, at 1:01 A. M., Mr. Perkins, superintendent of the Burlington road, wired the defendant road:

> "We cannot now accept Evarts stock; our line washed out again, will notify you when we can transmit stock." (Rec., 452.)

The conductors and division trainmasters were notified of this telegram and ordered to unload the stock, one train load of which had started and was at Saffordville. (Rec., 191.) It will thus be seen that before Cloyd's train could have been moved half way from Strong City to Atchison, the Burlington road was again washed out and notified the defendant that it could not receive the stock. Emporia is about twenty miles east of Strong City. After the flood the remnant of the cattle were shipped from Emporia via Atchison and Council Bluffs to Evarts. (p. 397.) They left Emporia on July 10th and arrived at Evarts on July 13th, being three days in transit. (Rec., 333.) As Cloyd's train was five days in transit, it must have been laid out two days on account of the flood, or diverted to some other line. If the other trains had been started from Strong City at the time Cloyd's train was started, as petitioners claim they should have been, they would all have been caught somewhere between Strong City and Atchison by the second washout on the Burlington, and there was no yard at Atchi-

son, or between Emporia and Atchison where they could have been unloaded.

Movement of the Trains Containing the Cattle in Controversy.

In considering whether or not there was culpable negligence in handling the trains containing the cattle in controversy, we must consider that the act of Congress then in force did not permit cattle to be kept in cars in transit more than twenty-eight consecutive hours, without unloading for feed and at least five hours rest. The cattle in question had been on the train nearly the full time allowed when they arrived at Strong City, and the time would expire before they could reach Atchison. The defendant had no feed yard north or east of Strong City, except the yard at Emporia, twenty miles east of Strong City. Other cattle were then in the Emporia yard (Conductor O'Byrne's train at least, see telegrams, Rec., 181, 182, 184, 188, 191, 193.) Strong City is a small station (Rec., 77), and only one train can be loaded or unloaded there at a time (Rec., 32). Emporia, twenty miles from Strong City, is the division point from which engines must be procured to move trains on that division (Rec., 200). Other cattle that were to be handled over the Atchison division were ahead of the cattle in controversy in this suit; Cloyd's train, one train at Burlingame, and some cattle at Emporia, how many, not shown. The telegraph service on the defendant's road was crippled during May 28th, 29th and 30th. (Rec., 197.) The water was high along the Atchison line, threatening to disable the line, and

a bridge near Atchison became impassable early on the morning of May 29th, completely disabling that line. (Rec., 196, 198.) The loss of that bridge also disabled the line from Holliday to Atchison, so that Atchison was completely cut off. (Rec., 196, 202.) The defendant had no yards between Emporia and Kansas City, nor between Emporia and Atchison, where a train load of cattle could have been unloaded and held. (Rec., 202.) *Where a connecting carrier notifies a preceding carrier that, owing to washouts on its line, or for any other reason, it will not receive and forward the stock, the universal custom and practice is to secure a route that will receive and forward the cattle if it is possible to do so.* (Rec., 202, 203.) The place where the Burlington road was disabled was at Hamburg, Iowa, and that disabled the line from Kansas City to Council Bluffs, as well as the line from Atchison to Council Bluffs. (Rec., 204.) The defendant promptly commenced negotiating with the Missouri Pacific road to receive the stock at Kansas City, and forward the same upon being notified by the Burlington that its road was disabled, and took the stock to Kansas City, as soon as practicable after obtaining an agreement from the Missouri Pacific to receive and forward it. (Rec., 203, 204.) There was no line from Kansas City to Omaha, or Council Bluffs, except the Burlington and the Missouri Pacific. (Rec., 203.) All of the foregoing facts were shown by the plaintiff's evidence, and were not contradicted. With these facts established as a part of the plaintiff's case, let us examine the movement of the cattle in dispute.

The first train load of cattle involved in this case,

to be considered is the train in charge of W. H. Frost, one of the plaintiffs. That train was designated on the train sheets in the trainsmaster's office as P. V. Symbol, 130 (Rec., 444), and consisted of 21 cars and contained 792 cattle, as shown by the shipping contracts (Rec., 11 to 18). That train left Hereford, Texas, on May 25, 1903, about 9:30 P. M. (Rec., 37, 38), and according to the testimony of the above mentioned W. H. Frost, arrived at Strong City on May 26th, about 11:30 P. M. (Rec., 38), but as shown by the train sheets in the train dispatcher's office, which were made at the time, and are undoubtedly correct, they arrived on May 27th, at 12:10 A. M. (Rec., 444), and were then unloaded for feed and rest (Rec., 39).

The Minnesota and Dakota Cattle Company had three train loads of cattle. The first train of 21 cars in charge of William Welsh left Kenna, New Mexico, on May 25, 1903, between 5 and 6 P. M. (Rec., 385.) They arrived at Wellington between 10 and 11 o'clock on the evening of May 26, 1903, where they were unloaded for feed and rest. (Rec., 349.) They were reloaded the next morning, May 27th, about 5 o'clock A. M. and then unloaded again. (Rec., 349.) They were unloaded because of the washout on the Burlington road, notice of which was received at Topeka that morning at 6:56 A. M. They were again loaded after the Burlington road was repaired, and left Wellington May 27, 1903, at 7:55 o'clock P. M. (Rec., 444), passed Strong City going east on May 28th at 1:11 A. M. and arrived at Staffordsville, eight miles east of Strong City, at 1:28 A. M., where they were stopped owing to a telegram announcing the second washout on the

Burlington road, and returned to Strong City, arriving there at 2:08 A. M. on May 28th. (Rec., 444.) That train was known as P. V. Symbol, 129. That train and Frost's train known as P. V. Symbol 130 were consolidated as one train and left Strong City on May 29th at 12:50 P. M. (Rec., 444), and arrived at Kansas City the morning of May 30th, and were unloaded at the stock yards about 7:00 A. M. (Rec., 42.)

The second train of 19 cars in charge of Rufus Cleveland, left Kenna, New Mexico, on May 26, 1903, about 6 o'clock P. M. (Rec., 328, 385), and arrived at Wellington on May 27, 1903, about 5:30 P. M. and were then unloaded for feed and rest (Rec., 328, 329), and arrived at Kansas City on May 29th at 5:00 P. M. (Rec., 328). The third train in charge of Chas. Steube, left Bovina with 17 cars on May 26, 1903, between 9 and 10 o'clock P. M. (Rec., 386). At Amarillo they picked up three cars which had been dropped from the second train making their train from Amarillo 20 cars. That train arrived at Wellington on May 27th, between 6 and 7 o'clock in the evening, and was there unloaded for rest and feed (Rec., 386). That train left Wellington on May 29th about 7 or 8 o'clock in the morning (Rec., 387), and arrived at Kansas City on May 30th, between 6 and 7 o'clock in the morning. The delay at Wellington was on account of the washouts on the Burlington road, telegrams having been sent to Wellington to hold the stock. (Rec., 180, 181, 184.)

Before giving the telegrams hereinafter copied, we will, for convenience, give the names and positions held by those sending and receiving such telegrams, as per stipulation in the record at page 187:

H. G. Clark, superintendent Mo. Pac. Ry., Atchison.
J. E. Hurley, general superintendent A. T. & S. F. Ry., Topeka.
E. A. Austin, trainmaster, A. T. & S. F. Ry., Topeka.
H. W. Sharp, superintendent, A. T. & S. F. Ry., Kansas City.
C. T. McLellan, superintendent, A. T. & S. F. Ry., Topeka.
W. K. Etter, chief clerk to General Superintendent Hurley.
F. C. Fox, superintendent, A. T. & S. F. Ry., Newton, Kan.
E. A. Gould, general superintendent, Mo. Pac. Ry., Kansas City.
C. W. Cook, assistant general freight agent, A. T. & S. F. Ry., Topeka.
W. J. Healy, freight auditor, A. T. & S. F. Ry., Topeka.
A. T. Perkins, superintendent, K. C. St. J. & C. B. R. R., St. Joe, Mo.
J. O'Byrne, conductor, A. T. & S. F. Ry.
J. H. Garside, agent, A. T. & S. F. Ry., Atchison.
H. B. M.—H. B. Morse, yardmaster, A. T. & S. F. Ry., Emporia.
L. E. M.—L. E. McClure, trainmaster, A T. & S. F. Ry., Newton.

On May 27th at 6:56 A. M. the Burlington road wired the Santa Fe road as follows:

> "Please notify A. T. & S. F., that on account of washouts cannot accept at Atchison the 20 cars Evarts stock reported to arrive Atchison 10:30 A. M. and the 22 cars reported to arrive at Atchison about noon; will advise later about third train. (Signed) A. T. Perkins." (Rec., 179; 448.)

The date of that telegram given on page 179 of the record as May 26, 1903, is incorrect. It should be May 27th, as shown by the same telegram on page 448, and as shown by the other telegrams relating to the same

matter. That telegram was received early on the morning of the 27th before the defendant could have loaded the cattle and started with them, even if Mr. Frost, one of the owners who accompanied the cattle, had requested that they be started early, which he did not do; and before the five hours rest required by the law expired. The cattle were held in the yards at Strong City pending the repair of the Burlington tracks, or a change of routing. On that day, May 27th, at 3:43 P. M., the Burlington road wired the defendant as follows:

> "We are now in shape to accept South Dakota stock at Atchison. Advise when it will be delivered. (Signed) A. T. Perkins." (Rec., 182, 452.)

That message was repeated to the general officers of the defendant company, at Topeka, at 4:02 P. M. on May 27th. (Rec., 452, 182.) The cattle were then reloaded into the cars about four or five o'clock according to Mr. Frost's testimony. (Rec., 39.) The defendant then at 10:25 P. M. on May 27th, wired the Burlington road:

> "First train of Evarts stock reloaded this P. M. should reach Atchison about 4 A. M. Second train 20 cars reloaded this P. M. should reach Atchison about 8 A. M. Third train of 20 cars reloaded at 7 P. M. should reach Atchison about 8:30 A. M. On account of high water we may be unable to handle this stock over the Atchison line in which case it will be about two hours later." (Rec., 184, 452.)

It will be seen by the testimony introduced by the plaintiff, that Strong City is a small station, and but one train could be loaded or unloaded at a time.

Cloyd's train was the first train in the yards at Strong City, and the first taken out. Conductor O'Byrne's train at Emporia was also ahead of Frost's train. Those trains and other business ahead of Frost's train must be handled ahead of Frost's train. The usual time required by a stock train to run from Strong City to Atchison, when the road is in good condition, is eight and a half or nine hours. (Rec., 176.) Mr. Frost testified that he superintended the unloading of his cattle into the pens at Strong City, and that it took from 11:30 until about 2 o'clock, about two or two and one-half hours, to unload the cattle. (Rec., 70.) It would probably take fully as long to reload them. At 4:02 P. M. on May 27th, the general officers of the defendant company at Topeka were notified of the repair of the Burlington tracks. (Rec., 452.) Nine hours afterwards, on May 28th, at 1[illegible]:01 A. M. the defendant road received from the Burlington road the following telegram:

> "*We cannot now accept Evarts stock; our line washout out again, will notify you when we can transmit stock.* (Signed) A. T. Perkins." (Rec., 452.)

This message was repeated to the tranmaster of the defendant's road at Topeka, and on that day, May 28th, at 1:13 A. M., the trainmaster at Topeka wired the trainmaster at Newton, in whose division Strong City is located, as follows:

> "Burlington just advise cannot accept stock for Evarts. Please hold all this stock until you are advised further." (Rec., 191.)

The trainmaster at Newton promptly ordered the conductors of the trains at Strong City to unload what

stock they had loaded, and also ordered the return of one load of stock from Saffordville to Strong City. (Rec., 191.) Allowing a reasonable time for loading Frost's train of cattle at Strong City, after the defendant was notified at 4:02 P. M. that the Burlington road was open, it will be seen that it would have been impossible by any degree of diligence to have transported that train to Atchison and delivered it to the Burlington road before 1:01 the next morning, when the defendant road was notified of the second washout on the Burlington road. After receiving the telegram from the Burlington notifying the defendant of the second washout on the Burlington line the cattle were again unloaded to await the repair of the track, or to make other arrangements.

When the telegram from the Burlington, announcing the second washout on that line was received at the office of J. E. Hurley, general superintendent of the defendant road, his chief clerk, W. K. Etter, wired him at Kansas City, where he then was, informing him of the second washout. Mr. Hurley then wired H. Miller, general superintendent of the Burlington road, as follows:

> "*H. Miller, Gen. Supt.*
> *Burlington, St. Jo. Mo.,*
> Understand you are again unable to accept stock account washouts. We have a number of shipments in sight for you and should be given prompt notice when you cannot accept them and as to what prospects are for accepting them. Please keep me posted. (Signed) J. E. Hurley." (Rec., 186.)

No answer appears to have been given to this tele-

gram, and Mr. Hurley again wired Mr. Miller as follows:

"TOPEKA, KAN., May 28, 1903.

H. Miller, Genl. Supt. Burlington,

We have 142 cars stock for you destined Sioux City, Iowa, Evarts, S. D., and Stair, Canada. Can you not accept this at Kansas City and handle it through. Answer quick. J. E. Hurley." (Rec., 183.)

No answer was made by the Burlington to that telegram, and Mr. Hurley commenced negotiating with the Missouri Pacific Railway to receive the stock at Kansas City and forward the same. He wired E. A. Gould, general superintendent of the Missouri Pacific road, on May 28th, at 12:40 A. M., as follows:

"We have three trains stock destined Evarts, S. D., by Burlington from Atchison, which Burlington cannot accept account washouts. Is your line open so that you can accept them and handle to a connection with C. M. & St. P." (Rec., 185.)

Not receiving a prompt answer to that telegram, Mr. Hurley wired H. G. Clark, division superintendent of the Missouri Pacific at Atchison, at 10:50 A. M., as follows:

"We have three train loads of stock for Evarts, S. D., via Burlington, which latter line cannot accept account of washouts. Are you in a position to accept." (Rec., 185, 453.)

On the same day Mr. Clark wired Mr. Hurley an answer at 11:52 A. M. as follows:

"ATCHISON, KAN., May 28, 1903, 11:52 A. M.

J. E. Hurley, Topeka, Kan.

This line is open. How many cars for Evarts, S. D., when and how many cars will you deliver at a time? Assume you will deliver at Atchison and stock to be delivered C. M. & St. P. at Omaha. H. G. Clark." (Rec., 185.)

Mr. Hurley properly considered this an agreement to receive and forward the cattle, and on the same day, at 2:35 P. M., he wired Mr. Clark as follows:

> "We will deliver stock to you at Kansas City. Will advise you number of cars and how they will arrive later." (Rec., 186, 453.)

Later during the same day he wired Mr. Clark as follows:

> "We will deliver you 22 cars of stock for Sioux City and 20 for Evarts, S. D. about 2:00 A. M. tomorrow, 29th." (Rec., 186.)

And afterward during the same day, still acting on the belief that the Missouri Pacific would receive and forward the stock, Mr. Hurley wired Mr. Clark as follows:

> "In addition to the 42 cars of stock which we will deliver to you at Kansas City tonight, we have one hundred cars in transit and which will reach you at Kansas City sometime tomorrow morning, 20 of these are destined to Stair, Canada." (Rec., 187.)

Relying on the agreement of the Missouri Pacific road to receive and forward the cattle, Mr. Hurley sent to his division superintendent at Topeka, the following telegram:

> "Let the stock for Evarts, S. D. go to Kansas City and deliver to Missouri Pacific." (Rec., 185.)

The same order was given to F. C. Fox, Division Superintendent at Newton, in whose district Strong City and Wellington are situated, and on that day, May 28th, at 3:20 P. M., Mr. Fox wired Mr. Hurley as follows:

> "Your pink. We will let Evarts stock go to Kansas City. We have two trains, 41 cars at

Strong City and one crew there will be ready to start as soon as they can load out, also have two trains 39 cars at Wellington and crews waiting there to protect, also will have one train with two cars horses and 18 cars cattle reach Wellington at 5:00 P. M. destination Stair, Canada, via Atchison and K. C. St. J. & C. B. which suppose will also have to go to Kansas City." (Rec., 186.)

Other telegrams passed concerning the forwarding of the cattle but the plaintiff introduced them in evidence without reference to chronological order, or any relation, one to another, and they so appear in the record, so it is only by carefully considering the contents of the telegrams, and the time of sending, when given, that we can determine the true relation, one to another.

While the defendant was preparing to forward the stock to Kansas City for delivery to the Missouri Pacific road, Mr. Gould, the general superintendent of that road sent to Mr. Hurley the following telegram:

"KANSAS CITY, May 28, 1903, 4:49 P. M.

J. E. Hurley, G. O.

Our line north of Atchison is in bad condition account high water and recent rains, being washed out and cribbed up in a good many places, but we may manage to get through. We will endeavor to handle your three trains of stock from Kansas City or Atchison to Omaha, with the distinct understanding that you assume all responsibility for damage to your equipment and stock and to our equipment on account of any accident to which the shipment may be involved from any cause whatsoever, and to pay usual detourage charges. Please advise if you desire it handled on this basis, and where you will deliver our trains and what time. Give us ample notice." (Rec., 187.)

On the same day, at 6:36 P. M., Mr. Clark, Superin-

tendent of the Missouri Pacific road at Atchison, wired Mr. Hurley as follows:

> "Will accept the 42 cars stock at Kansas City for Sioux City and Everts S. D. with the distinct understanding your line will accept all responsibility and pay any claims that may arise by reason of delay due to high water. Our line is threatened by high water, but desire to accommodate you if possible, and think will get through but cannot accept responsibility for delays. Stock will not move unless above accepted. Answer quick." (Rec., 188, 453.)

The hour of sending above message given on page 188 of record as 7:36 A. M. is incorrect as shown by the time of receipt and forwarding of the same telegram as shown on pages 453-4, and by the fact that Mr. Hurley's first telegram to Mr. Clark was sent at 10:50 A. M. as shown by the same telegram on page 453, and Mr. Clark's answer to the first telegram was sent at 11:51 A. M. (Rec., 453.) This discrepancy in time of sending this message was noticed by the attorneys for plaintiff at the trial. (Rec., 454.)

This defendant could not accept the remarkable offer of the Missouri Pacific road to accept the stock if this defendant would be responsible for all damages arising "from any cause whatsoever" and wired Mr. Gould as follows:

> "Cannot give you the stock under conditions referred to in your telegram. Your traffic dept. have advised our traffic dept. as to participation in rate and your supt. at Atchison advised you would accept the stock. If you dont want to accept on this basis wire at once as stock is now loading. Ans. quick." (Rec., 187.)

He also wired Mr. Clark on the same day at 8:05 P. M. as follows:

> "The stock goes to you on revenue basis is not detoured therefore cannot accept any responsibility; we loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City. Ans. quick." (Rec., 185, 189, 454.)

While awaiting developments with the Missouri Pacific road, Mr. Hurley wired Mr. Fox to stop loading stock (Rec., 188), and during the progress of the negotiations, Mr. Clark, Superintendent of the Missouri Pacific at Atchison, wired Mr. Hurley as follows:

> "Cannot accept 100 additional cars stock at Kansas City until further advised." (Rec., 188.)

Mr. Hurley then called up Mr. Gould by telephone and had a conference with him about the transportation of the stock, and Mr. Gould agreed to receive and forward the same, and in confirmation of that agreement he wired Mr. Hurley on May 28th, at 8:32 P. M. as follows:

> "KANSAS CITY, May 28, 1903.
>
> Confirming phone, we will accept stock coming from your line here. Your wires to our Supt. Clark, Atchison this date. E. A. Gould." (Rec., 188.)

On the same day, May 28th, at 9:52 P. M. H. G. Clark, Superintendent of the Missouri Pacific road, wired Mr. Hurley as follows:

> "Will accept the stock at Kansas City. Advise when you will deliver the 100 car lot." (Rec., 189, 455.)

The above telegrams and the telephone conversation between Mr. Hurley and Mr. Clark, constitute the

agreement of the Missouri Pacific road to receive the stock at Kansas City and forward the same.

Mr. Hurley ordered the stock forwarded to Kansas City. (Rec., 189.) He also directed Mr. Sharp, Division Superintendent, at Kansas City, to keep the Missouri Pacific advised when the 100 cars of stock for them would reach Kansas City. (Rec., 190, 192.)

On May 29th, Mr. Clark wired Mr. Hurley as follows:

> "All arrangements made to handle the 142 cars cattle. Am now advised first 42 cars delivered Burlington. Advise. Also inform me in regard to other 100 cars. When will it be delivered." (Rec., 192.)

Mr. Hurley answered that telegram as follows:

> "The first 20 cars stock for Evarts S. D. will reach Kansas City about 8:00 P. M. 41 cars more destined Evarts about 8:30 P. M. 20 cars more destined Medicine Hat, Canada will reach Kansas City early tomorrow morning. 19 cars more destined Evarts, S. D. being delayed and cannot say when they will reach you." (Rec., 193.)

The date of that telegram is given as May 28th but should be 29th, evidently being a mistake in copying.

On May 29th at 9:14 A. M. Mr. Clark again wired Mr. Hurley as follows:

> "We are holding crews at Kansas City to protect stock. Am now advised you turned 42 cars over to Burlington. Can you say if we will get the 100 cars? If not wish to turn the crews back to Atchison. Please answer quick." (Rec., 194.)

Mr. Hurley answered that telegram as follows:

> "Your wire in regard to stock. 19 cars will reach Kansas City about 1:30 P. M. today. Balance of it will reach Kansas City late this evening

> or tonight. Cannot give you correct figures on it now, but will do so as early as possible." (Rec, 194.)

The 19 cars mentioned in that telegram arrived in Kansas City May 29th about 5:00 P. M. (Rec., 328), and were delivered in the cars to the Missouri Pacific road on May 30th, at 6:35 A. M. and receipted for by Mr. Isit, the Missouri Pacific agent at Kansas City. (Rec., 473, 474, 494, 520, 629, 630, 632, 633, 634, 194.)

On May 29th after those cattle were delivered to the Missouri Pacific road, Mr. Clark wired Mr. Hurley as follows:

> "The 19 cars stock on arrival at Kansas City were set to yards to be unloaded for feed and rest. Please advise quick when other 81 cars will reach Kansas City and if they will require feed and rest at that point." (Rec., 194.)

Upon receipt of the 19 cars of cattle the Missouri Pacific road unloaded them into the stock yards for feed and rest on May 30th, at 9:25 A. M. (Rec., 508, 509, 551), without the knowledge of the defendant. (Rec., 475, 522.) The remainder of the cattle arrived at Kansas City on May 30th, and were unloaded into the stock yards for the Missouri Pacific road at 7:00 A. M. as stated by Mr. Frost (Rec., 42), or at 8:20 A. M. as shown by the stock yards record (Rec., 548, 549), that being the usual and customary way of transferring cattle from one road to another at Kansas City, as we shall show elsewhere. Telegrams other than those above copied, show that the Missouri Pacific road was kept fully advised as to the movement of those cattle. (Rec., 190, 192.) As the records in the offices of the Missouri Pacific and Santa Fe roads at Kansas City

were destroyed by the flood, local telegrams between the two roads at that point could not be produced.

We have stated that Mr. Miller, of the Burlington, did not answer Mr. Hurleys' telegram asking if the Burlington could not accept the 142 cars of stock at Kansas City. That statement is true although a Mr. Barnes of the Burlington did wire Mr. Kouns of the Santa Fe, on May 28th, 7:26 P. M. that they could accept the stock at Kansas City (Rec., 189) but that telegram was sent to Mr. Hurley's office in Topeka, and Mr. Hurley was then in Kansas City negotiating with and making arrangements with the Missouri Pacific to handle the cattle, and it is not shown that Mr. Hurley ever saw or knew of that telegram.

The telegrams above quoted were introduced by the plaintiff as part of their case and they not only fail to show any negligent delay on the part of the defendant in the movement of the cattle, but on the contrary, with the other evidence introduced by the plaintiff, they affirmatively show beyond controversy the necessity for the delay that occurred at Strong City and Wellington. The undisputed evidence shows that it takes from five and a quarter to six and a quarter hours to run a stock train from Wellington to Strong City (Rec., 444), and from eight and one-half to nine hours from Strong City to Atchison. (Rec., 176.) About 15 hours from Wellington to Atchison, and about eight and one-half hours from Strong City to Atchison.

There were four train loads of cattle caught in the flood. One belonging to the Empire State Cattle Company, and three to the Minnesota & Dakota Cattle Company. The Empire State Cattle Company's train in

charge of Frost, President of the company, arrived at Strong City on May 27th, at 12:10 A. M. (Rec., 444.) The first train belonging to the Minnesota & Dakota Company, in charge of Welsh, arrived at Wellington on May 26, at 10:00 or 11:00 P. M. (Rec., 349), and were unloaded and fed, and reloaded on May 27th at 5:00 A. M. (Rec., 349.) The second train in charge of Cleveland arrived at Wellington May 27th at 5:30 P. M. (Rec., 328.) The third train in charge of Steube arrived in Wellington on May 27th about 6:00 or 7:00 P. M. (Rec., 386.) The Santa Fe road received notice of the first washout on the Burlington road on May 27th at 6:56 A. M. (Rec., 484, 179.) At that time the first train of Minnesota & Dakota Company cattle, at Wellington, were reloaded ready to start, but were unloaded on account of the washout. The other cattle belonging to the Minnesota & Dakota Company had not reached Wellington at that time. The Empire State Cattle Company cattle, at Strong City, had not been fed. Frost said they were fed and ready to start at 11:00 A. M. that day. (Rec., 39.) Notice of the repair of the Burlington road was received on May 27th at 3:43 P. M. (Rec., 182, 452.) On May 28th at 1:01 A. M. notice was received of the second washout on the Burlington road. (Rec., 186, 191, 452.) All cattle that had been loaded, were unloaded after each washout. See the following telegrams, pages: 180, last telegram; 181, 183, first and fifth telegrams; 184, first and last telegrams; 185, first telegram; 191, third, fourth, and fifth telegrams.

After the second washout on the Burlington, the Santa Fe arranged with the Missouri Pacific to receive the cattle at Kansas City and forward the same.

(Rec., 185, 3rd, 4th and 5th telegrams.) The stock was then reloaded for shipment to Kansas City. (Rec., 185, last telegram; 186, 1st, 2nd, 4th and 5th telegrams; 187, first and last telegrams; 192, 1st telegram.) Then the Missouri Pacific road made its demand that the Santa Fe road assume all responsibility for loss or damage "from any cause whatsoever," and all stock that had been loaded was unloaded. (Rec., 187; 188, first telegram; 191, second telegram.) Then on May 28th at 8:32 P. M. the Missouri Pacific road again agreed to receive the stock (Rec., 188, 4th telegram and Rec., 189, 4th telegram), and it was promptly loaded and forwarded to Kansas City. (Rec., 191, first and last telegrams; 190, all telegrams; 189, 3rd telegram.)

The telegrams and the testimony of Mr. Hurley show that the defendant's line from Topeka to Atchison was in bad condition near Atchison and at Valley Falls and near Topeka, and that a bridge near Atchison went out early on the morning of May 29th, totally disabling that line. All of this testimony was introduced by the plaintiff, the copies of the same telegrams produced by defendant's witness Garside, commencing on page 448, being introduced for the purpose of fixing the dates and hour of sending and receiving, where it could be done.

During the time the stock was held at Strong City and Wellington there was nothing in the condition of the weather, or the state of the river to indicate any necessity for any extraordinary haste in forwarding, or caution in handling the cattle. They were going to pastures and not to market. When the cattle left

Wellington and Strong City the Kansas river was swollen but there was no unusual flood. There was water over the railroad track at two places between Topeka and Kansas City, at Holliday and at a point about three miles west of Lawrence. (Rec., 293, 296, 297.) But those were low places and overflowed when the water was high. (Rec., 293, 296, 297.) Superintendent McLellen was receiving reports from the Rock Island railroad as to the condition of the river above Topeka, but from the reports received he did not think the railroad tracks would be flooded. (Rec., 348.) There is no evidence in the record that would indicate to any one, on May 28th or 29th that the river would rise to a height that would injure stock in cars or in pens in the valley.

THERE WAS NO CULPABLE NEGLIGENCE IN TAKING THE STOCK TO KANSAS CITY. THE FINAL FLOOD CONDITIONS WHICH CAUSED THE DISASTER WERE UNPRECEDENTED THERE AND COULD NOT HAVE BEEN REASONABLY ANTICIPATED.

The final agreement of the Missouri Pacific to receive the cattle at Kansas City, and forward the same, was made on Thursday, May 28th, at 8:32 P. M. and 9:52 P. M. by the general superintendent and by the division superintendent. (Rec., 188, 189.) The same evening orders were issued for the reloading and shipment of the stock. (Rec., 190, 191.) They arrived at Kansas City, one trainload on Friday evening May 29th, and the others on Saturday morning May 30th, about six or seven o'clock (Rec., 387) and were unloaded into the stock yards and receipted for by the

Stock Yards Company, one train on May 29th at 3:15 P. M., two trains on May 30th, at 8:20 A. M., and one train, delivered to Missouri Pacific and by it to the Stock Yards Company, at 9:25 A. M. (Rec., 548, 549, 550, 551.)

At the time the cattle were delivered to the Stock Yards Company for the Missouri Pacific Railway Company, there was nothing to indicate the disastrous and unprecedented flood that came on May 30th, 31st and June 1st.

The danger line at Kansas City, that is the stage of the river at which it begins to overflow the lowlands, is 21 feet. (Rec., 315.) The greatest flood at Kansas City since the country was settled by white people, and prior to 1903, was in 1881. (Rec., 553, 572, 530.) At that time the river rose to 26.2 feet, 5.2 feet above the danger line. (312.) In 1892 the river rose to 24.9 feet, 3.9 feet above danger line. (Rec., 315.) In 1902 it rose to 23.1 feet, 2.1 feet above the danger line. (Rec., 316.) *During those floods there was no water in the stock yards at Kansas City, except in a low place that was the old abandoned bed of Turkey creek.* (Rec., 552, 572, 577, 578.)

During the flood of 1902 when the water rose to 23.1 feet at Kansas City, the defendant's tracks were overflowed at Holliday and west of Lawrence, the same places that were overflowed on May 27th and 28th, 1903. (Rec., 293, 296, 297.) The defendant's division superintendent, who was then attending the protection of the tracks near Lawrence, and who was receiving reports from the Rock Island road, of the river conditions above Topeka, did not believe, and had no rea-

son to believe, that the flood would be of such magnitude as to cause serious trouble, or to cover the tracks at Kansas City. (Rec., 348.)

The stock yards at Kansas City are located on the highest part of the river valley. (Rec., 577.) Mr. Child, a witness, had lived at Kansas City thirty-five years before the flood of 1903, and had been in the employ of the stock yards as yard master, superintendent, assistant manager or supply agent, for over 33 years. (Rec., 529.) Mr. Fletcher had lived in Kansas City 33 years. (Rec., 552.) Mr. Swingley, 44 years. (Rec., 564.) Mr. Cable, 38 years. (Rec., 576.) They were all familiar with the Kansas river valley at Kansas City during that time, and with the location of the stock yards; Mr. Swingley and Mr. Cable being familiar with the land there before the stock yards were located. They were all witnesses at the trial, and testified that *there never was any overflow of the stock yards, or of the grounds where it was located, except a little in the abandoned bed of Turkey creek, during the flood of* 1881. (Rec., 530, 552, 553, 572, 577, 578.) Mr. Swingley was at the stock yards during the highest part of the flood of 1881, and there was no water except in the low place that was formerly the bed of Turkey creek. (Rec., 572.) *No witness testified that there had been water in the stock yards prior to* 1903, *except in that low place.*

On May 28th the stage of the river was 21.7 feet. On May 29th it was 23.3. On May 30th it was 25 feet (Rec., 300), and still there was no water in the stock yards, nor even in the basement of the exchange building in the stock yards when Mr. Coombs left his office

on Saturday evening, May 30th, at 7:00 o'clock (581); and at that time there was nothing to indicate that the yards would be flooded.

Some of the witnesses speak of the rains in the Kansas river valley being continuous, or nearly continuous during the month of May, but that is not true as shown by the weather reports. At Manhattan there was no rain on May 1, 3, 4, 6, 9, 10, 16, 17, 18, 20, 24, 28, and only a trace of rain on May 8, 11, 15 and a very little rain on May 2, 7, 13, 14, 22, and 25. (Rec., 322, 317.) At Concordia there was no rain on May 1, 2, 3, 4, 6, 8, 9, 10, 14, 16, 17, 18, 20, 24, 30, 31, and but very little on May 7, 21, 25, 26 and the 28th. (Rec., 323, 317, 318.) At Hays City there was no rain on May 1, 2, 3, 4, 5, 9, 10, 14, 16, 17, 18, 19, 20, 21, 24, 25, 26 and 31, and only a trace on May 12 and 15, and but little on May 5, 13, 23. (Rec., 323, 318.) At Dresden there was no rain on May 1, 4, 5, 9, 12, 14, 16, 17, 18, 19, 20, 21, 23, 24, 27, 28 and 31, and only a trace on May 3, 8, and 25. (Rec., 323, 318.) These are all the stations in the Kansas river watershed that reported to Mr. Connor at the Kansas City office, and they fail to show continuous rains for showery month of May, or any unusual rainfall, except the heavy rain of May 29th at the western stations but which was only 0:02 of an inch at Kansas City. (Rec., 300.)

That heavy rainfall on the 29th, 2.38 inches at Manhattan, 3.78 inches at Concordia, and 2.21 inches at Hays City (Rec., 317, 318), *would not be reported to the Kansas City office in the usual course of business until May 30th, but as May 30th was a legal holiday*

they were not received on that day. Mr. Connor says in his report issued on May 30th,

> *"Being a legal holiday no weather reports received, and only vague reports from Kaw points, telegraphic communications very, very poor."* (Rec., 302.)

In his comments of May 31st, Mr. Connor says:

> *"No reports of any kind received. Cut off from telegraph or telephonic communications, excepting to eastward, nothing could be said except what was actually happening in this vicinity."* (Rec., 302.)

On June 1st Mr. Connor says "No reports received from Kaw points." (Rec., 302.) *As he did not receive the report of the heavy rain of the 29th on the 30th or 31st or on June 1st, they were not received until after the flood subsided, and of course would be no information to bring notice of the flood to the defendant, even if it had received his reports. But Mr. Connor says he did not send his reports to the Santa Fe road.* (Rec., 309.)

On May 29th Mr. Connor gives the stage of the river as 23.3 feet (Rec., 300), and in his warnings and comments of that day he says:

> "Both Missouri and Kaw rivers continue rising. The flood in the Kaw may become very serious without the addition of rains liable to fall today and tonight. *It may go 2 or 3 feet higher in next 36 hours."* (Rec., 301.)

The 2 or 3 feet higher predicted by Mr. Conner, added to the present stage of the river, 23.3 feet, would make the stage of the river 26.6 feet at the highest, which would be only 0.4 of a foot higher than the flood of 1881 which did no damage at the stock yards.

There was therefore no alarming conditions on the evening of the 28th and morning of the 29th of May when the stock was loaded and started for Kansas City. *There was nothing to indicate to the defendant that the stock yards at Kansas City would be flooded, or that the stock would be endangered at Kansas City.*

Mr. Steube, one of the owners of the Minnesota & Dakota Company's cattle, was with and in charge of those cattle. Mr. Frost, the president of the Empire State Cattle Company, was with and in charge of those cattle. They were with the cattle in central Kansas and had been there for two days. They knew the amount of rain that had fallen, and were as capable of understanding the conditions surrounding them, as was the defendant. Mr. Frost was at Strong City where the water was then high in the Cottonwood river. They knew that they were being detained on account of high water on the Burlington road between St. Joe and Council Bluffs. In his testimony Mr. Frost testified concerning the delay at Strong City, as follows:

"Q. Now did you have any talk with the agent at Strong City, during that day (May 27th) as to washouts on the Burlington road?

A. I had some talk with the agent, yes, sir.

Q. And he told you that the Burlington road had reported that its track was washed out and could not forward the cattle, did he?

A. Yes, sir.

Q. And it was by reason of that delay that the cattle were there awaiting advices from the Burlington road as to when they could receive them?

A. I don't know.

Q. That is what the agent told you, was it?

A. Yes, sir.

Q. He told you that the Burlington road had notified them that they could not receive the cattle until their track was repaired, did they not?

A. All he said to me was, washouts.

Q. Washouts on the Burlington road, did he?

A. At one time he said on the Burlington road, but at another time between St. Joe and Council Bluffs.

Q. At one time he told you there was a washout on the Burlington road, and at another time he told you there was a washout between St. Jo. and Council Bluffs?

A. Yes, sir.

Q. You know of your own knowledge that the road running from St. Jo. to Council Bluffs is the Burlington?

A. Yes, sir.

Q. You know that there is only one road running through St. Jo. to Council Bluffs direct, on that side of the river?

A. That is all I know about.

Q. That is called the Burlington road?

A. Yes, sir.

* * * * *

Q. So that the road is the same road, when you speak of washout on the Burlington you mean the road your cattle was going over?

A. Yes, sir.

Q. So when you were detained at Strong City, you were advised by reason of the washout on that road, were you not?

A. Yes, sir." (Rec., 71, 72, 73.)

This testimony relates to the delay caused by the first washout on the Burlington road. After the washout was repaired the cattle were reloaded and moved from the yards ready to go out (Rec., 73). The agent then notified Mr. Frost that he had received word that the Burlington road was again washed out, and they

backed up and unloaded the stock again (Rec., 73). Mr. Frost testified:

"Q. Did you object to their being unloaded again?

A. I had nothing to say in the matter.

Q. You did not say anything one way or the other?

A. No, sir." (Rec., 73.)

On the morning of the 28th they commenced reloading the cattle again when they were again stopped by the washout on the Burlington road, and the cattle were again unloaded. (Rec., 73.) Mr. Frost was again notified that they were being unloaded on account of a washout. (Rec., 73.)

When the cattle were unloaded the third time Mr. Frost said to the defendant's station agent at Strong City, that he "was getting pretty tired of that kind of business."

"Q. Getting pretty tired of holding the cattle there?

A. Yes, sir.

Q. Did you tell him you wanted them sent on whether they ran into washouts or not?

A. No, sir.

Q. You did not say you wanted him to forward them on their way, whether the forwarding road would receive them or not?

A. No, sir. *I asked him if they could not be run around the flooded district.*

Q. *You asked him if they could not run them around the flooded district?*

A. *Yes, sir.*

Q. *You asked him to run them around the flooded district?*

A. Yes, sir.

Q. When was it you asked him that?

A. I think it was the 28th, the last time we unloaded." (Rec., 74.)

Mr. Frost asked that the cattle be run around the flooded district. There were three routes from Strong City to Council Bluffs; one by way of Atchison and from there over the Burlington road which was then washed out. One by way of Superior, Nebraska, and from there to Council Bluffs over the Elkhorn road, but the Superior line was then under water, and in a dangerous condition and was washed out during the evening of that day (Rec., 200); *and the third by way of Kansas City and from there over the Burlington or Missouri Pacific to Council Bluffs, which latter was the only line open and was the one adopted.*

It will be seen that Mr. Frost was fully informed as to the cause of the delay at Strong City, *and he protested against such delay and asked that the stock be run around the flooded district.* That necessitated a change of the route via Atchison or the Burlington. He suggested the line by way of Superior and over the Elkhorn road but the Superior line was under water, and the Elkhorn road had no officers nearer than Omaha who would have authority to arrange to move the stock, and that would be inconvenient, and would cause unnecessary delay in communicating with them. The Missouri Pacific officers were at Kansas City and St. Jo. and their line was much more direct. The change of routing by the defendant via Atchison or the Burlington was requested by the shipper; it was necessary and proper under the circumstances and was in accordance with custom. It was made with all reasonable diligence.

The cattle were transported from Strong City and Wellington to Kansas City without unnecessary delay,

part of them going all the way over the defendant's tracks, and part of them over the Frisco tracks from Olathe to Kansas City, which is a shorter line than the Santa Fe, being 21 miles by the Frisco, and 25 miles by the Santa Fe. So that if the Empire State Cattle Company's cattle were taken over the Frisco (St. Louis and San Francisco) road as stated in the petition for the writ of certiorari, and in its brief, they were not taken in a "round about way" as therein stated, but in a more direct way. But we think those cattle were taken to Kansas City on the Santa Fe, and not on the Frisco road, as Frost testified that they passed through Argentine, which is on the Santa Fe, and not on the Frisco road. (Rec., 41, 78.)

THE CATTLE WERE DELIVERED AT THE KANSAS CITY UNION STOCK YARDS TO THE MISSOURI PACIFIC ROAD TO BE FORWARDED.

One train load of the cattle arrived at Kansas City and was delivered to the Missouri Pacific road together with the way bills, on May 30th at 6:35 A. M., and was receipted for by that road (Rec., 473, 474, 475, 493, 494, 495, 518, 520, 524), and Mr. Clark, the division superintendent, acknowledged receipt of them by wire, although the date of message is wrong, no cattle being delivered on the 29th. (Rec., 194.)

The way bills were changed by the chief clerk in the Santa Fe office by striking out the word Atchison and inserting K. C., and striking out K. C. St. Jo. & C. B. and inserting Mo. P. (for Missouri Pacific) before they were sent to the Missouri Pacific road. (Rec., 495.)

The Missouri Pacific unloaded the cattle into the stock yards for feed and rest on May 30th at 8:20 A. M. (Rec., 549, 508.)

Mr. R. P. Isitt, the freight and ticket agent of the Missouri Pacific road, was called as a witness by the plaintiff, for the purpose of proving that the Missouri Pacific road did not receive the cattle. He testified among other things, as follows: Mr. Ball handed the witness two papers that were introduced by the defendant, Exhibits 14a and 14b, and asked:

"Q. Those are bills, receipts for the way bills are they not?

A. These are receipts interline way bills.

Q. They appear to be stamped by the Missouri Pacific, passed June 30, 1903? (Rec., 630.)

Q. Question read, what does that stamp mean?

A. This is a stamp put on by a clerk in my office when he handles these interline bills which are referred to, instead of the document, and stamps that as an indication they have been received.

Q. And do you know how they got on there a month after the flood?

A. No, sir, I could not tell, there were many things happened at that time nobody can explain. (Rec., 630, 631.)

Q. Have you your record there?

A. Yes, sir, I have part of the record, *I have the receipt of the cars, the cars were received from the Santa Fe.*

Q. That the cars or the cattle?

A. That the cattle were unloaded, they were placed to the unloading chutes and unloaded.

Q. By the Court: By the Missouri Pacific?

A. They were unloaded by the stock yards.

Q. They were unloaded at your chutes?

A. *Yes, sir, unloaded at our chutes.*

Q. Who placed them there?

A. *We placed them there. By the Missouri Pacific road.* (Rec., 632.)

Q. By the Court: Can you tell at the time the person signing this receipt whether or not they were receipting for loaded or unloaded cars?

A. Yes, sir.

Q. *And this is a receipt for loaded cars?*

A. *Yes, sir.*" (Rec., 634.)

The receipt spoken of by Mr. Isitt was returned to the Santa Fe road by mail. It usually took several days before such receipts were returned, but owing to the flood, the Missouri Pacific office being flooded and partly destroyed and their records damaged or destroyed, it took thirty days for the return of that receipt.

The other cattle were delivered to the stock yards company, together with the waybill stubs, for the Missouri Pacific road. The Missouri Pacific road had been advised that the cattle were enroute, and were notified that they were in the stock yards for them. *The universal custom and practice at the Kansas City stock yards, where cattle are brought in by one road, to be forwarded by another, where the cars are not to accompany the cattle, is for the company bringing in the cattle, to deliver the cattle with the waybill stubs, to the stock yards company, and the stock yards company delivers the cattle to the company that is to forward them.* The waybill stub is practically a duplicate of the waybill, and shows everything that the waybill shows.

Upon such delivery the rights and liabilities of the delivering company cease. From the waybill stubs that accompany the cattle, the stock yards company

enters in a book kept for that purpose, the names of consignor, consignee, the routing, and final destination. (Rec., 543.) This book is accessible to the public, and the live stock agents of all the railroads consult it to ascertain what cattle are consigned to their roads. The agent of the forwarding road gives the order for the reloading and forwarding of the cattle in the absence of the owner. (Rec., 532, 539, 543.)

> "The connecting line through their live stock agent, took (takes) the matter up, from our records, noting by our records that they are routed by their line, and the agent would make a memorandum of it, and if the owner was not there to give the order—written order, the agent himself would give it upon the stock yards company, on blank forms which the stock yards company furnish, for the reshipment over their line. Upon receipt of that order, from that agent, the stock yards company would take the cattle from the pens and reload them." (Rec., 540.)

Upon the question of the custom and practice of the various railroads and the stock yards company, in regard to the shipment of cattle through Kansas City, the following testimony was introduced.

Mr. Roberts, local live stock agent of the defendant, at the stock yards, testified as follows:

> "Q. Do you know the custom of the various railroads doing business in Kansas City, at the stock yards in Kansas City, in regard to the shipment of stock through Kansas City, that is where one road brings in the stock to be delivered to another road, what is the custom as to delivery through the stock yards?
>
> Q. By the Court: Do you know the custom?
>
> A. Yes, sir, I do.
>
> Q. What is the custom?
>
> A. For the road bringing in the stock to de-

liver it to the stock yards company with the waybill stub showing the final destination of the shipment.

Q. The waybill stub?

A. Yes, sir. *In addition to that a verbal notice to the representative of the connecting line informing them that the stock was there at their disposal.*

Q. Has it not been the custom and practice ever since you have been connected with the business?

A. Yes, sir. (Rec., 464.)

Q. What was the custom about notifying the agents of the roads of the arrival of the stock; was there any formal notice?

A. No, sir, just called them, just told them, and called them up over the 'phone, any way just so they knew it.

Q. Is it or is it not the custom of the stock yards company to notify the agents of the different roads when they receive stock for them; what is the practice in that regard?

A. The notice of the stock yards company is pasted in their records in a book accessible to the public.

Q. Is it the custom of the agent of the ~~defendant~~ roads to consult those records for the purpose of ascertaining the arrival of stock for them?

A. Frequently it is." (Rec., 465.)

Mr. H. P. Child, supply agent of the stock yards company, who has been in the service of that company as yardmaster, superintendent, and assistant general manager for over 33 years, testified as follows:

"Q. Are you familiar with the customary manner of transacting live stock business through the yards, by the stock yards company, and the various railroads that connect therewith?

A. Yes, sir.

Q. State fully what the custom and practice has been and is, in relation to stock that is shipped

into Kansas City by one railroad to be shipped out of the city by another railroad to its destination?

A. The stock yards company acts as the agent of both companies, to the extent of receiving the stock at the platform, unloading it into the chutes, taking it to the proper pens, and feeding and watering it, in such quantities as the owners may designate; and, at the proper time for reshipment, the connecting line, through its live stock agent, delivers the stock yards company a written order to load their stock on such trains as he may designate, which order is invariably accepted and acted upon and carried out.

Q. *State whether or not in cases where shipments of live stock are made through Kansas City, and delivered by one railroad to the stock yards company to be transported over another line of railroad from Kansas City to the ultimate destination, the delivering company has anything whatever to do with the stock, after they have been turned over to the stock yards company?*

A. *Nothing at all.*

Q. *Nothing at all?*

A. *No.*

Q. *When turned over to the stock yards company, the delivering company, so far as that car is concerned, ceases to have any control of it afterwards—is that correct?*

A. *The stock yards company receives the stock, and receive the charges and bills, which are charged to the stock yards company, and the stock yards company pays the delivering road the charges, through freight charges, or whatever charges they bring, and the stock yards company afterwards, puts these same charges on the receiving road,* if they are not paid by the owners in cash—and collects them at the terminus—the receiving road collects them at the terminus, and then reimburses the stock yards company.

Q. Where cattle are fed by the stock yards

company in the yards and cared for, and the owner does not pay the bills personally, in cash at the time, before the stock are delivered to the railroad company, or is to take the stock away from the stock yards, what is the custom with relation to those charges?

A. They are delivered to the receiving railroad company, with the stock and are accepted by them.

Q. And paid by that railroad company, are they?

A. Collected at the other end, and then paid by that railroad to the stock yards company, the stock yards company in the meantime having paid the delivering road." (Rec., 532, 533.)

In regard to the question as to how the order is obtained, and from whom, for the reloading or reshipment of cattle at the stock yards, Mr. Child testified:

"Q. I believe you said that, customarily, the delivering company after turning over the cattle to the stock yards company had nothing further to do with them, in the matter of getting them to the connecting company, and that the shipping them out was wholly in charge of the stock yards company?

A. No, the connecting line, through their live stock agent, took (takes) the matter up from our records, noting by the records that they were routed by their line, and the agent would make a memorandum of it, and, if the owner was not there to give the order, written order, the agent himself would give it upon the stock yards company, on blank forms which the stock yards company furnish, for the re-shipment over their line. Upon receipt of that order, from that agent, the stock yards company would take the cattle from the pens and reload them. (Rec., 539, 540.)

Q. In transferring cattle beyond Kansas City, from a railroad company in from the west to some other direction, north or east, to some other road

north or east, is it or is it not, considered a delivery when they are turned over to the stock yards company so far as the railroad bringing the cattle are concerned—in other words, *does the road which brings the cattle in the stock yards have anything to do with them, or control over them, ordinarily, after they have been turned over to the stock yards company where they are to be transported beyond?*

A. *It is my understanding that turning them over to the stock yards company, closes the obligation of the delivering road.*

Q. *They—the delivering companies—have no further control over the cattle, then, afterwards, under ordinary circumstances, where the cattle are to be forwarded over another line?*

A. *No sir.*" (Rec., 541, 542.)

J. W. S. Hutchings, superintendent of the stock yards company, and who has been connected with the stock yards business at Sioux City, Chicago and Kansas City, testified:

"Q. You may state, then, what is the custom in regard to the handling of cattle where they are brought into a terminal city by one railroad, on billing to be forwarded over some other road to destination?

A. We have a record in our receiving and shipping office that shows the consignor and consignee, and the final destination, and the information is gotten there, that source, by the connecting line, and ordered out; an order is issued to the stock yards company to load the stock in so many cars at a certain time.

Q. State whether or not the railroad which brings the stock in and turns it over to the stock yards company, under ordinary conditions has anything more to do with it, after it has been turned over to the stock yards company?

A. I think that is practically the end of it.

Q. That ends their connection with it?

A. Yes, sir.

Q. *State whether or not that is considered a delivery so far as the company bringing the stock is concerned?*

A. *Yes sir.*

Q. The stock yards company then takes charge of it, and handles it until turned over and loaded into the cars of the forwarding company, is that correct?

A. Yes sir." (Rec., 543.)

W. A. Combs, assistant general live stock agent of the defendant, testified in regard to the delivery of the cattle to the connecting carrier, through the stock yards, that they were delivered in the usual and customary way. He said:

"Yes sir, we did everything that is customary to do in delivering cattle to a connecting carrier —it was done in the same usual manner that is the custom always to do, we delivered those cattle to the stock yards company, for the connecting carrier, and those that were to go through without feeding we delivered to the Missouri Pacific." (Rec., 582.)

Mr. L. A. Allen, one of the plaintiff's witnesses, testified as follows:

"Q. The Kansas City stock yard is a public yard?

A. Yes sir.

Q. *Whenever cattle are brought in there and turned into the yard by delivery of the railroad company, then the other railroad without any further definite order takes the cattle, loads them out and ships them on?*

A. *Yes sir.*

Q. And that is the usual practice in the yard?

A Yes sir, when they are consigned through.

Q. That is the general custom?

A. Yes sir." (Rec., 251, 252.)

The stock yards company pays to the delivering company all charges up to the time of delivery to the stock yards company, and those charges so paid by the stock yards company, together with the stock yards company's charges for feed and care, follow the cattle and are paid by the forwarding company and collected at the destination from the consignee. (Rec., 533, 540, 544.)

The stock yards company is in fact, one link in the line of carriers, and in legal effect the transfer to and from the stock yards company, is the same as the transfer to and from any intermediate carrier, and a delivery to the stock yards company for the forwarding company terminates the rights and liabilities of the delivering carrier. The Empire State Cattle Company's cattle, and Welsh's train load of cattle, were loaded on May 29th about 7:30 or 8:00 A. M. (Rec., 40) and as one train arrived at Kansas City on May 30th, about 7:00 A. M. (Rec., 41), and unloaded at the stock yards at 8:20 A. M. (Rec., 549.) One train load of the Minnesota & Dakota Cattle Company's cattle was delivered in the cars to the Missouri Pacific road as we have shown. The third train of their cattle in charge of Mr. Steube, one of the owners, was loaded at Wellington May 29th, about 6:00 or 7:00 A. M. and arrived at Kansas City on May 30th about 6:00 or 7:00 A. M. (Rec., 387) and were unloaded into the stock yards at 8:20 A. M. (Rec., 548, 549, 550.) The 28 hours allowed by law had nearly expired when the cattle were unloaded, and would expire before the cattle would reach the next feeding station, so it was proper and necessary to unload them for feed and rest. The

Kansas City stock yard is a public yard, and subject to legislative regulation and control. It is a means of effecting transportation of commerce by affording a connection between the various railroads entering Kansas City. Cattle brought to Kansas City by one road, to be forwarded by another, are unloaded from the cars of one road into the stock yard, and there fed and watered, and loaded into the cars of the forwarding road, all by the stock yards company.

When so unloaded into the stock yards, they have passed beyond the control of the delivering company, and are subject to the orders of the owner, if he is present, or in his absence, to the forwarding company; and are not subject to the orders of the delivering company.

Under the uncontradicted evidence the cattle were delivered to the stock yards company for the Missouri Pacific road, and defendant had lost control of them. Mr. Frost, the shipper and one of the owners of the Empire State Cattle Company's cattle, was with, and in charge of those cattle. Mr. Steube, one of the owners of the Minnesota & Dakota Cattle Company's cattle, was with and in charge of those cattle. They were the representatives of the plaintiffs. Neither of them objected to the cattle being unloaded into the stock yards. Neither of them requested the defendant to resume possession of the cattle, and it could not have done so without their order. Neither of them made any objection or request of any kind, except that the cattle be forwarded to their destination in Dakota, and the defendant had no line by which they could be forwarded.

THE DEFENDANT WAS NOT GUILTY OF CULPABLE NEGLIGENCE AFTER THE CATTLE ARRIVED IN KANSAS CITY AS THE FLOOD ROSE RAPIDLY AND UNEXPECTEDLY THERE.

The plaintiffs, in their petitions, alleged that the flood which injured their cattle was *"extraordinary and unprecedented,"*—an act of God. They then alleged that the defendant was guilty of negligence in not using "due and reasonable care" in not anticipating the flood but in taking the cattle to Kansas City and in not removing same from the stock yards, which rendered it liable notwithstanding the unprecedented flood. They took upon themselves the burden of proving negligence on the part of the defendant. For that purpose they introduced evidence to show the flood conditions and the defendant's knowledge of those conditions. They produced C. T. McLellan, the defendant's division superintendent at Topeka, to prove his knowledge of the situation. He testified that he was near Lawrence protecting the track from the flood. He was receiving reports from points west of Topeka. He testified:

> "There was nothing in the reports to indicate that we would have any serious trouble.
>
> Q. From the reports which you did receive, you believed that your tracks in Kansas City would not be flooded?
>
> A. I had reason to think so.
>
> Q. You did think so?
>
> A. Yes sir, I did think so." (Rec., 348.)

He testified that the main line between Topeka and Kansas City became impassable on May 29th *by reason of low places at Holliday and at or near Lakeview. These places had been flooded during other high waters.* (Rec., 296, 297.)

Mr. Hurley, general superintendent of defendant also testified for the plaintiffs, and identified the telegrams introduced by the plaintiff (Rec., 179 to 195), which show the necessity for the change of the routing from Atchison to Kansas City by reason of washouts on the Burlington road, and the bad condition of defendant's road between Topeka and Atchison, and that all arrangements had been made for the Missouri Pacific to receive the cattle at Kansas City and forward the same, including the participation in rate. (Rec., 187.) Mr. Frost had demanded that the cattle be run around the flooded district. *No other course was open to the defendant than the one adopted by sending the stock to Kansas City, and from there over the Missouri Pacific.* (Rec., 205.) The defendant had numerous other trains of stock to handle, and its stock yards were nearly all full. (Rec., 205.) The defendant had no other yards at or near Kansas City where it could have held the stock. (Rec., 205.) *The cattle were put into the stock yards for the Missouri Pacific which was the usual and customary way of delivering stock to a connecting carrier.* (Rec., 205, 206, 207, 251, 252.) The cattle were taken from Emporia to Kansas City by way of the "cut off" to avoid passenger trains, that being the usual route for stock trains. (Rec., 211.) *The tracks at Holliday are low and frequently flooded, but the stock yards at Kansas City had never been flooded, neither had the tracks in Kansas City been flooded, and Mr. Hurley had no idea that they would be flooded.* (Rec., 214.) *He was receiving advices from Topeka, and personally went to Argentine to investigate the flood conditions, and from the best information he could obtain he did not think the stock yards, or the tracks in that*

vicinity would be flooded. (Rec., 214.) *So confident was Mr. Hurley that the vicinity of the stock yards would not be flooded, that he removed the engines and coaches from Argentine and placed them in their yards near the stock yards, and during the flood a hole was washed out in that yard 220 feet long, 38 feet deep and 110 feet wide, and four engines, a Pullman car and some coaches were submerged therein.* (Rec., 215.) *The waters rose so rapidly that the best passenger train on defendant's road was caught at the Union depot, and submerged.* (Rec., 215.)

Mr. Allen was a witness for the plaintiff. He testified as to the flood conditions, and as to the practicability of driving the cattle from the stock yards through the city to pastures, to get them out of the flooded district. He testified that a few small lots of cattle, probably native cattle, were driven out, but that was frequently done as to small lots of cattle to be held over. He said that there were pastures about six miles from the stock yards, between Kansas City and Independence where they could have been kept. (Rec., 257.) Independence is east of Kansas City, Mo. The stock yards are on the west of Kansas City, Mo., between Kansas City, Mo., and Kansas City, Kansas. As to the practicability of driving 3,000 Texas cattle through the streets of the city, Mr. Allen testified:

> "Q. You know as a matter of fact it very frequently happens when a Texas steer gets out of the yards there, they cause a great deal of trouble in the streets?
>
> A. Yes, sir.
>
> Q. That very frequently happens?
>
> A. Yes, sir.
>
> Q. And chase people in the streets?

A. Yes, sir.

Q. And break through show windows sometimes?

A. I believe that has happened.

Q. And you know as a fact that some have gone through the principal streets of Kansas City, Mo., and went through plate glass windows?

A. Yes, sir.

Q. You know that very frequently it happens, do you not?

A. Occasionally.

Q. You know of people being frequently run down by them in the streets, do you not?

A. Well, yes, not frequently run down.

Q. Texas cattle get loose and take after a man and run over him if he don't climb a telegraph pole?

A. A wild Texas steer will do it." (Rec., 629.)

Mr. Kendrick, live stock agent of the Burlington road was called to prove that the cattle could have been shipped on May 30th over the Burlington road. He tried to say that the Burlington road had equipment and could have taken the cattle, but when the court asked him directly he said he did not know.

"Q. By the Court: That is not the question; the question is whether you know you had plenty of equipment to take these cattle out?

A. I don't know.

Q. (By Mr. Ball.) You do not know whether you had?

A. No, sir." (Rec., 288.)

Mr. Kendrick also testified that the Burlington road did send out thirty-five cars of cattle on Saturday evening, May 30th, but when asked in what direction they were sent, he said "east." (Rec., 290.) Sending them east would be toward St. Louis or Chicago, to both of which places the Burlington had lines of road. But

the cattle in question were to be sent northwest, to Omaha, and not east.

No other way is suggested by which they might have been sent out of the flooded district. It is not shown that the Burlington could have taken them; and driving 3,000 wild Texas cattle through the streets of the city is entirely impracticable. (Rec., 580, 581.)

The viaducts seemed as safe as any place and the stock yards company had the right to suppose that the flood would disappear from its yards as rapidly as it had approached.

Flood Conditions.

As to the flood conditions there was no dispute as to the facts, and there is no room for dispute as to the reasonable inferences to be drawn from the facts that were known at Kansas City before the catastrophe was upon that city.

When the cattle arrived in Kansas City. on Saturday morning May 30th, the stage of the river was 25.00 feet (Rec., 300), 0.1 foot higher than the flood of 1892 (Rec., 315), and 1.2 feet below the flood of 1881 (Rec., 312.) The rainfall for the preceding 24 hours was 0.64 of an inch. (Rec., 300.) *The heavy rainfall in central Kansas had not been reported at Kansas City, and was not reported until after the flood subsided. The only rains reported by the weather bureau, were the rains in eastern Kansas, and the only danger predicted was for points below Kansas City* (Rec., 302.) There was then no water on the stock yards, nor in the basement of the exchange building at the stock

yards. *There was then no information from western points that would indicate a flood that would overflow the stock yards, or damage stock therein. Mr. Child, the general supply agent of the stock yards company at Kansas City, whose special duty it was to look after flood conditions* (Rec., 529, 530), *and who was by special arangement receiving telegrams from Mr. Jennings, the officer in charge of the weather bureau at Topeka* (Rec., 531), *did not know the dangerous magnitude of the flood.* He testified that there was nothing alarming in the reports he received. (Rec., 531, 537, 538.) Mr. Child could only find two of the telegrams that he had received. They were both dated May 30. One was sent at 3:47 p. m. and is as follows:

"River rose 6 inches since noon."

The other one, sent at 8:10 p. m. is as follows:

"River risen 6 inches since 3 p. m." (Rec., 538.)

These telegrams show a rise of 6 inches from noon to 3:47 p. m., and of six inches from 3 p. m. to 8:10 p. m., only six inches in the last five hours, showing that instead of the rapidity of the rise increasing it was diminishing. That was not an unusual rise and gave no hint of a dangerous flood. *Mr. Connor, the United States Weather Bureau officer at Kansas City, whose sole business it was to keep posted on the weather conditions, had no information that would indicate a flood at Kansas City sufficient to flood the stock yards, and he did not anticipate such a flood.* Being a legal holiday, Mr. Connor had no reports from western stations

of the rainfall for the preceding twenty-four hours. All he could say was that the "heavy rains in Missouri and eastern Kansas last night renders the situation more alarming *for points below Kansas City.*" (Rec., 302.) The last telegram from Mr. Jennings of Topeka, to Mr. Child, at 8:10 p. m., showed that the river was not rising as fast as it had been, indicating that the flood was at about its highest point. (Rec., 538.)

The live stock exchange building is located in the stock yards at Kansas City. The basement of that building is several feet lower than the level of the ground at the stock yards. The basement was all occupied by offices. The offices of the live stock agents of all the railroads at Kansas City, were in that basement. (Rec., 241.) Not one of those agents anticipated a flood that would damage their property and records, and not one moved anything from their offices. The first floor above the basement was occupied by the Inter-State National Bank, and by 25 or 30 offices. Nothing was removed from the bank or from any of those offices. The water was about two feet and a half on the floor of the bank and offices, destroying furniture, records and papers. There were several other banks in the flooded district. Every packing house in Kansas City is in that district. Nearly all the railroad shops, yards and offices were located there. Nearly all the large warehouses, implement houses and wholesale grocery houses were located in that district. The union depot is there. Nearly all of the large factories were there. Thousands of car loads of merchandise were standing in the railroad yards in the flooded district; over 1,400 of them in the Santa Fe

yards alone. There were numerous hotels, stores, lumber yards and other large industries in that district. *Not a dollar's worth of property was removed by any of the above named industries in anticipation of the flood. The owners and agents left their places of business on Saturday night, May 30th, feeling perfectly secure, and having no information or intimation of the calamity so soon to overtake them.* The only things removed from the flooded district before the flood were a few cattle and some mules; and the water got up to the mules' bellies before they got out. (Rec., 243.) *Thousands of hogs, cattle and sheep were left in the stock yards and drowned.* (Rec., 258.)

Mr. Hurley, general superintendent, and Mr. Sharp, division superintendent, were in Kansas City closely watching the flood situation, and receiving reports from Topeka. They got on the top of a box car and went from Kansas City to Argentine, which is immediately west of Kansas City, for the purpose of investigating the condition of the flood, returning from Argentine on May 30th about 12:30 p. m. At that time the lowest part of the yards in Argentine were flooded, about four inches of water being over the rails. There was also a low place near the Rex Mill, between Argentine and Kansas City, that was flooded, *but there was no water in the yards at Kansas City.* After carefully investigating the situation from Kansas City to Argentine, and at Argentine, and considering all the information they could obtain from points up the river, they concluded that the crest of the flood had about reached Argentine, and that there was no danger. Mr. Sharp testified as follows:

"Q. Now, while you were at Argentine investi-

gating the flood conditions with Mr. Hurley, as to the probable further rise in the river, based on the information that you had from up the river; what conclusion did you and Mr. Hurley come to at that time as to condition of the flood, whether it would probably rise any higher or not?

A. We thought from the information which we had, and which he told me, and from the way the water had been rising that the crest of the flood had about reached Argentine, and we figured that even in the lowest part of the yard, we believed if we got as much as two feet more, that the contents of the cars would not be damaged. * * *

Q. From your personal examination of the flood conditions at that time at Argentine and from your conferences with Mr. Hurley, and the best information you could obtain from up the river, did you at that time, apprehend that there would be any further rise in the river?

A. We did not think that there would be any further rise that would cause us, or that could possibly cause us any trouble. * * *

Q. Was there anything in the information which you had to indicate at that time that you would have a rise, or further rise of two feet?

A. No, sir; there was not, and we did not think there would be that much.

Q. Well, you may state whether or not at that time you had any reason to apprehend any further rise in the Kaw river?

A. We had not; the fact of the matter is we went up there for the purpose of sizing up the situation, and to see and talk the matter over, and to judge of the conditions, and we did as I have stated and Mr. Hurley came to the conclusion that the flood had reached its maximum height, and we thought that we were absolutely safe, because even should it rise as high as two feet more, and which we did not consider it probable, we would be entirely safe on all or our merchandise cars." (Rec., 600, 601, 602.)

So confident were Mr. Hurley and Mr. Sharp that the water would not rise high enough to cover the defendant's Kansas City yards, that they removed the engines and coaches from the Argentine yard, to the Kansas City yard, and placed them in the Kansas City yard near the stock yards (Rec., 603), upon ground that was lower than the stock yards (Rec., 603), where they thought they would be entirely safe. (Rec., 603.) Believing that their yards in Kansas City would not be flooded, Mr. Hurley left his private car in the yards near the depot, where it was caught by the flood and submerged. The places where the engines and cars were placed were submerged, and a hole excavated under the cars, in which hole four engines, a Pullman car and some coaches were submerged. (Rec., 215, 604.) *The best passenger train on defendant's road came into the depot to discharge passengers; the engine was detached and sent to the yard to be coaled to resume the run, but was caught by the rapidly rising waters before it could return to the train, and engine and train were submerged, so rapid was the rise of the river.* (Rec., 595.) The defendant's office building where the division superintendent's office was kept, and where their records were kept, and where Mr. Hurley stopped while in Kansas City, was in the river bottoms near its yard. No records were removed, but they were submerged and destroyed. (Rec., 593, 600.) The defendant had over 1,400 cars of merchandise at Argentine and Kansas City, all of which were submerged and destroyed. (Rec., 601.) *During the night of May 30th, and morning of May 31st the river rose rapidly, and without any notice having been received of the tremendous rise that was approaching.* (Rec.,

610, 611.) *From four o'clock Sunday morning until noon, the water rose 7 or 8 feet.* (Rec., 596, 611.)

Up to the time that the flood actually arrived and overwhelmed Kansas City, the defendant had no knowledge of the approach of a flood that would endanger its property; and no information from which an inference of danger could be drawn. In addition to what has already been quoted from Mr. Sharp's testimony he testified as follows:

"Q. Did you have up to that time, to the time you finished moving that equipment out of the Argentine yard, any information, any time, from up the river indicating a rise which would flood your Kansas City yard?

A. None. (Rec., 603.)

Q. *Up to the time that this flood actually broke into your Kansas City yard and flooded what is called the west bottoms of Kansas City, Missouri, including the stock yards district, did you have any information from up the river which would indicate a rise to the extent of flooding that district?*

A. *No, sir; I did not.* (Rec., 606.)

Q. Do you know, now, that ten feet of water passed Topeka Friday evening about nine o'clock, a ten foot rise on top of the condition you have been telling about?

A. I never heard of it until I heard it mentioned in this court this morning. (Rec., 610.)

Q. So that rise did pass Topeka about nine o'clock Friday evening?

A. No, sir; I never heard of that until to-day.

Q. Do you know when that rise left Manhattan?

A. No, sir; I don't know anything about that ten foot rise, I never heard of that until to-day. (Rec., 611.)

By the form of the questions asked Mr. Sharp and other witnesses, the plaintiff's attorneys attempted to leave the impression that a wall or breast of water ten feet high swept down the valley past Manhattan and Topeka to Kansas City, but that condition was purely the creature of the imagination of the plaintiff's attorney. No witness testified to such a condition or circumstance. That there was a rise at Kansas City, that was unprecedented in volume and rapidity of its rise is unquestioned. That it was also wholly unannounced and unprecedented is equally true. The weather bureau, the stock yards company and the defendant were each and all trying to ascertain the weather conditions. Others were probably doing the same thing. *Yet it is beyond controversy that no one had any intimation of the volume of water that was approaching the city.* They knew a flood was coming, as other floods had had come, but they did not think it would inundate the bottom lands, except in the low places. *No railroad, warehouse, packing house, bank, wholesale grocery house, factory, or other industry moved a dollar's worth of property at Kansas City before the flood came upon them; except the few mules above mentioned, and they were moved as the flood was rising, and the mules were nearly drowned while being taken out, the water being up to their bellies before they got out.* (Rec., 243.) *There were about twenty or twenty-five thousand people living in the flooded district of Kansas City, Kansas, which was on the west side of the Kansas river* (Rec., 565, 573), *and several thousand on the east side of the river above and below the stock yards. None of those people knew of the approach of that flood until it was upon them. They*

saved nothing except the clothing they wore, many of them being rescued by boats, with no clothing but their night clothes. (Rec., 563, ~~559,~~ 570.) *About two thousand houses were washed from their foundations, and many of them floated down the river* (Rec., 558), *and the inhabitants were rescued by boats and otherwise, and about* 25,000 *of them were housed in churches, school houses and other public buildings.* (Rec., 569.) *Large brick buildings were swept away.* (Rec., 571.) *There were sixteen bridges across the Kansas river in Kansas City, Kansas, all supposed to be above the reach of the flood, and every bridge was swept away, except the Missouri Pacific Railroad bridge* (Rec., 531, 558), *and that was saved by placing thereon about* 15 *or* 16 *locomotive engines, extending from one end of the bridge to the other.* (Rec., 460, 558.) Those engines held the bridge but they were completely submerged by the water, and by drift wood brought down stream by the flood. (Rec., 459, 558.) *The streets in the flooded district were filled with houses, freight cars, lumber and other articles to such an extent as to completely fill the same.* (Rec., 570, 571, 579, 461, 463, 555, 560.)

Of all the people living in the flooded district, and of all the railroads, stock yards, packing houses, banks, warehouses, wholesale houses, elevators, factories and other large industries located in that district, not one knew of or was warned of the nature or extent of the approaching flood; and not one moved a dollar's worth of property in anticipation of it; except as above stated. The books, papers and records in the various railroad offices were of great importance, containing as they did,

the record of the immense volume of business passing into and out of and through Kansas City, and could have been easily moved if they had known of the extent of the flood. But they were not removed, but were submerged and destroyed. (Rec., 598.) *The flood was of so much greater volume than any reports that were received, had indicated, that everybody was taken by surprise and they were wholly unprepared for it.* If the true volume of the flood had been reported from Topeka, but little could have been done toward the removal of the 1,400 cars of merchandise and the stock and other property from the flooded district before the flood cut off the movement of trains, as the track was under water between Argentine and Kansas City, and in Argentine, and at Holliday, west of Argentine, even if the cattle had not been delivered to the forwarding carrier.

When the flood arrived in Kansas City on Sunday morning, May 31st it swept fifteen or sixteen bridges from their piers into the river; about 2,000 houses from their foundations; hundreds of freight cars from the tracks; and every lumber yard in the bottom lands was emptied. Houses, lumber, cars and other wreckage was piled in the streets completely blocking the streets, and upon the wrecked bridges, and upon the Missouri Pacific bridge and the locomotives thereon, so that the river was completely dammed and the water ran over the top of the locomotives on the bridge; and the wreckage in the streets added to the obstruction to the flow of water, so that the river rose rapidly, and much higher than it otherwise would, the river being 10.5 feet higher at the mouth of Turkey creek, near the

stock yards, than it was at the Hannibal bridge over the Missouri river, about a mile below. (Rec., 530.)

No ordinary care or prudence could have foreseen the extent of the flood in that locality in time to avoid its consequences. The most prudent and careful bankers, manufacturers, packers, merchants, and business men of all kinds failed to foresee the dangerous character and extent of the flood, or to avoid its consequences. All of this appears from the plaintiff's testimony (see testimony of L. A. Allen on pages 241 to 249), as well as by the testimony for the defense. (See testimony of W. Fletcher, commencing on page 552, H. S. Swingly, page 564, and Ore Cable, page 576.)

This is the character of the evidence upon which the plaintiffs rely, and upon which they must rely, to prove that by the exercise of reasonable care and prudence the defendant should have foreseen that the flood would rise to such a height at the Kansas City Stock Yards as to injure the cattle in such yards, and should have moved them to a place of safety other than upon the viaducts. *The plaintiffs' contention is and must be that the defendant should have foreseen what no one else foresaw; and should have guarded against that which no one else guarded against.*

The testimony introduced on the trial, by the plaintiffs and defendant, conclusively showed that the flood was wholly unprecedented in volume, and in the rapidity of its rise.

THE STATEMENTS OF FACT IN THE PETITION FOR THE WRIT OF CERTIORARI, AND IN PLAINTIFFS' BRIEF, ARE CONFUSED AND MISLEADING, AND IN MANY PARTICULARS ARE UNSUPPORTED BY THE EVIDENCE, OR DIRECTLY CONTRARY THERETO.

In introducing the telegrams found in the record on pages 179 to 195, the plaintiffs, for some resaon best known to themselves, so arranged and introduced said telegrams that they do not follow each other in the order in which they were sent; and in order to ascertain what telegram is in answer to any other particular telegram, regard must be had to the context of the telegrams, and the hour of sending, where that is shown, rather than to the arrangement in the record.

On page 17 of the plaintiffs' brief, it is said that Mr. Connor sent daily weather reports to the public, presumably for the purpose of showing that the defendant received such reports, and thus had notice of the amount of rainfall in the Kansas river watershed. But Mr. Connor said he did not have the defendant on his list of persons or companies to whom he sent such reports. (Rec., 309.) Moreover, the evidence shows that Mr. Connor had no knowledge of the unprecedented conditions until after the flood struck Kansas City.

On page 31 of the plaintiffs' brief, it is said that if the cattle in question had been forwarded from Strong City as Cloyd's train was, the injury to the cattle would have been avoided. But there is no testimony that those cattle went by way of Atchison, and we have elsewhere shown that the second washout on the Bur-

lington road occurred before those cattle could have reached Atchison; and that they were delayed somewhere in transit two days.

In plaintiffs' brief, on page 33, it is said both Frost and Newton testified that the defendant's agent at Strong City informed them that the detention of the cattle at Strong City was on account of high water along the line of defendant's railway. No such testimony was given by Newton or Frost. Mr. Newton testified:

"Q. You got a telegram to what effect? What information came to you gentlemen as to why they were to be unloaded?

A. On account of high water.

Q. Where?

A. Where?

Q. Where was the information that you got that the water was high?

A. Well, I don't know.

Q. That is all that you heard, was it?

A. Just on account of high water. (Rec., 132.)

On cross-examination he testified:

Q. What did the agent say about it?

A. He just said it was on account of high water.

Q. Did he say where the high water was?

A. No." (Rec., 151.)

Mr. Frost testified:

"Q. Now, did you have any talk with the agent at Strong City, during that day as to washouts on the Burlington road?

A. I had some talk with the agent, yes, sir.

A. And he told you that the Burlington road had reported that its track was washed out and could not forward the cattle, did he?

A. Yes, sir.

Q. And it was by reason of that delay that the

cattle were held there awaiting advices from the Burlington road as to when they could receive them?

A. I don't know.

Q. That is what the agent told you, was it?

A. Yes, sir that is what the agent told me. (Rec., 71.)

Q. Washouts on the Burlington road, did he?

A. At one time he said on the Burlington road, but at another time he said between St. Jo and Council Bluffs." (Rec., 72.)

St. Jo and Council Bluffs are both on the Burlington. This testimony refers to the delay at Strong City, on May 27th and 28th. The defendant asked Mr. Frost directly as to the condition of the track on the 29th.

"Q. Didn't he tell you before you left Strong City that the Santa Fe line between Topeka and Atchison was out of business on account of washouts?

A. I don't think so, if he did I have no recollection of it." (Rec., 74.)

The telegrams introduced by the plaintiffs also show that the detention was by reason of washouts on the Burlington road, as we have herein shown. (See Rec., 179, 180, 181, 191, 452.)

On page 34, the plaintiffs say that the situation of this shipment was so exceptional as to call forth the interposition of the general officers of the defendant company, from the time of the arrival of the cattle at Strong City. That statement only shows the lack of information on the part of plaintiffs' counsel, as to the manner of handling train loads of cattle, which are run as extra trains and to be delivered to a connecting carrier. All such trains must be run upon orders from the general superintendent, or from the divi-

sion superintendents. No such train can start without orders from the trainmaster, and he must know the hour and minute when such train passes each station. The connecting carrier must also be advised of the number of cars and probable time of arrivel of such trains, so they may be forwarded without delay. All such orders must emanate from the general officers, regardless of weather conditions.

The plaintiffs assume as a fact that there was a deviation of the cattle from an agreed route to some other route. (Brief, pages 35, 36.) There was no route agreed upon, not even any specified or requested by the shippers, and no deviation. The only contracts were the written contracts shown in the record (pages 12 to 19.) There were no bills of lading issued as stated on page 36 and elsewhere in their brief, and the endorsements on the back of the contracts were made by some agent of the initial carrier, were not uniform, and were not part of the contracts as we have heretofore shown. The endorsement copied on page 36 of plaintiffs' brief, "Live stock contract, Hereford, Texas, to Atchison, Kansas," found on some of the contracts, shows that it was a mere memorandum, indicating two points only on the route designated by the initial carrier for itself and connecting carriers, and not intended as a part of a contract for a through shipment from Hereford, Texas, to Evarts, S. D.

On page 39 the plaintiffs say that on May 28th there was a downpour of five inches of rain in the Kansas river water shed, and in consequence thereof there was a "tidal wave" of nine feet in the Kansas river at Topeka, on May 29th. Those statements are grossly

and inexcusably exaggerated, as well as absurd. Mr. Jennings did testify that there was a rainfall of five inches at Salina, but it was not shown how or where he obtained that information. It was not shown that Salina was a weather station. He may have obtained his information from rumors which are not always reliable. No weather bureau station reporting to Mr. Connor reported such a rainfall. Manhattan, east of Salina, Hayes, west of Salina, Concordia, north of Salina, and Dresden northwest of Salina, are all the weather stations in the Kansas river watershed that report to Mr. Connor, and none of them report such a rainfall. If there was such a rainfall at Salina it was local. No other witness reported such a rainfall, and Mr. Jennings spoke only from memory, and not from records, which he said he kept. (Rec., 220.) As to the "tidal wave" at Topeka, nine feet, on May 29th, Mr. King, the only witness who was in a position to give reliable information as to the actual rise of the river at Topeka, said that the river at Topeka rose 10.1 feet from May 28th at 8:30 a. m. until May 30th at 9 p. m. (Rec., 224.) Instead of a tidal wave of nine feet the river rose ten feet in two days and a half. There was no river gauge at Topeka, and the reports from there and points above only give the rise from time to time, without any indication as to how much the river was above low water mark.

In determining whether or not the defendant's officers in charge of the shipment of cattle, (notice to all others would be immaterial), should have foreseen the danger to the cattle at Kansas City, regard must be had of the *situation and condition existing at Kansas*

City at the time, and of former floods, as well as the condition of the Kansas river, which is a tributary of the Missouri river at Kansas City. Mr. Connor testified that there was not much flood conditions in the Missouri river and particularly none north of the St. Joseph, Mo. (Rec., 313), so that the Kansas river was the only source from which a flood was likely to come. There was no river gauge on the Kansas river above Kansas City, and the reports from points on that river were therefore of but little value as to the actual volume of water in the river.

But if the defendant's officers had known at the expiration of each hour, of the actual height of the river above low water mark at Topeka, or any other point, there would not have been reasonable grounds to fear that *the stock yards at Kansas City* would be flooded, or stock injured therein. Mr. King, the city engineer, of Topeka, testified that at its highest point the flood reached 26.98 feet above low water mark. (Rec., 224.) As there was practically no flood conditions in the Missouri river it would not be reasonable to expect the Kansas river to rise as high above low water mark, at its mouth, where it has an opportunity to spread out over the Missouri valley, as it was at points above. The flood of 1881 reached a height of 26.2 feet above low water mark at Kansas City (Rec., 312), and at that time the stock yards were not flooded. It could not be anticipated therefore, that the river would rise much if any above 26 feet at Kansas City, and that could do no damage at the stock yards. *But the river became choked and dammed up with wrecked bridges, cars, houses, lumber and other articles to such an extent that*

it rose to 35 *feet at the Hannibal bridge, and* 10.5 *feet higher about a mile above at a point near the stock yards.* (Rec., 530.) *The Kansas river rose so much higher than the Missouri river that articles floating out of the Kansas river went up the Missouri river a mile or more before striking the opposite shore.* (Rec., 557.) This condition was evidently caused by the fact that the channel of the river was dammed by bridges, locomotives and driftwood, and that the streets and other passageways by which the water could have escaped, were also filled with buildings, cars and other things, and not by a tidal wave which existed only in the imagination of plaintiffs' counsel.

It is claimed by plaintiffs that no arrangement was made with the Missouri Pacific road to receive the cattle at Kansas City, because Mr. Douthitt, the live stock agent, said he did not make such arrangement (Brief, 40), and this in the face of the telegrams introduced by the plaintiffs, showing that the general superintendents of the two roads did make such an arrangement. When Mr. Douthitt was asked from what source he derived his authority to, in effect, override the contracts of the general superintendent, he said: "I got it from knowledge of the business and the way it is conducted and from experience." (Rec., 275.) But Mr. Douthitt knew that arrangements had been made to forward the cattle, that the cattle were in the yards for them and said they would try to move them (Rec., 281), but were afraid to start with the cattle on account of high water. He testified, "I know we were afraid to start with it, for the reason we went down to try." (Rec., 279.) He then makes the excuse for not moving

them, that they did not have the motive power to handle them. (Rec., 272.) But they had 16 or 17 locomotives to place upon their bridge to hold it in place.

Another instance of misstatement of the facts is found in plaintiffs' brief, on page 42, where it is said that the evidence of Mr. Kendrick "shows that the Burlington railroad, on that day had plenty of engines and cars with which to haul out these cattle from Kansas City north over the Burlington railroad to Council Bluffs." Mr. Kendrick, an agent for a rival road, did attempt to testify that his road, the Burlington road, could have taken out the cattle. The court did not believe his testimony and took him in hand and asked two questions.

"Q. The question is, do you know?
A. I say, we had plenty of stock cars.
Q. That is not the question; the question is whether you know you had plenty of equipment to take these cattle out?
A. I don't know."

Mr. Ball then asked him:

"Q. You do not know whether you had or not?
A. No, sir.'" (Rec., 228.)

They also copy, on page 43, a part of Mr. Kendrick's testimony that the Burlington road did take out 35 cars of cattle on the evening of that day, as tending to show that it could have taken these cattle north to Council Bluffs. On page 44 they say that this testimony of Mr. Kendrick was introduced for that purpose. It is now cited to this court for that purpose. It is remarkable that counsel would cite that evidence to this court for that purpose, when the witness testi-

fied that he did not know that they had sufficient equipment to handle the cattle, and that the 35 cars of cattle, which they did send out, went east where there was no flood, and not north over the line to Council Bluffs, which was washed out, as shown by the telegrams introduced by the plaintiff.

It is also claimed that because some one moved 700 mules out of the bottom lands, taking about three hours to do so (plffs.' brief, page 45), the defendant should have moved the cattle out to some other place of safety. But the defendant had already delivered the cattle to a connecting carrier. The viaducts in the yards were then apparently safe places. It was not shown that the plaintiffs, who were present, requested that the cattle be driven through the city, or were willing to assume the responsibility for the consequences of driving 3,000 head of wild Texas cattle through the streets of the city. It was not shown that the defendant had any means of driving them through the city, either horses or men. It is true Mr. Allen says that the commission men had horses, but no suggestion that they would undertake such a task as driving those cattle through the city. He also said there were two livery stables which hired horses. But there is no evidence that they would have hired out horses to drive 3,000 Texas cattle through that flood which was up to the mules' bellies before they got out, and was rapidly rising, with a swift current, and filled with driftwood, as the evidence shows. Mr. Allen testified that he did not know whether or not the defendant had men and horses at Kansas City, available for use in driving the cattle away from the stock yards (Rec., 628), and the court

struck out his evidence that commission men, traders, etc., had horses, because it was not shown that they were defendant's employes (Rec., 624), and no proper assignment of error on account of such ruling was made by the plaintiff, and as Mr. Allen is the only witness who testified about men and horses being available there is no evidence on that point before this court. It was not shown that there was any place where the cattle could have been driven and held, nearer than six miles, and that place was on the opposite side of the city from the stock yards, and it was not shown that the defendant had any knowledge of that place. Aside from the impracticability of driving 3,000 wild Texas cattle through the city, with dogs chasing them, and the cattle chasing people (Rec., 580, 629), it would have been impossible to drive them out, after it became apparent that the stock yards would be flooded, if horses and men were available for that purpose, which is not shown. The claim that they should have been driven through the city is an afterthought of some one not familiar with the nature and habits of wild Texas cattle, as these were, being from the extreme western part of that state. Moreover the mules were driven out from Sparks' stables or yards because there were evidently no viaducts or high places there upon which they could have been driven for temporary safety.

On pages 49 and 50 of their brief the plaintiffs quote what they claim was the testimony of Gardiner Lathrop, given on the trial of the case. No evidence whatever was given by Mr. Lathrop on the trial. The plaintiff offered his deposition in evidence which was

ruled out by the court (Rec., 415), and that ruling was not presented to the Circuit Court of Appeals by a proper assignment of errors, or even suggested in their brief filed therein, so it is not in the case for any purpose.

On page 52 of plaintiffs' brief, it is said that "the defendant does not deny that it did not perform its duty, if it owed a duty," toward these cattle after they were turned into the stock yards. In other words the plaintiffs would have the court believe that we admit that we were negligent, if we still owed a duty to the plaintiffs concerning those cattle. That is not our position. We prefer to state our position in that matter in our own way. Our contention is that we had delivered the cattle to a connecting carrier, or to the stock yards company for the connecting carrier, and that such delivery, according to the custom, terminated our connection with the cattle, and our liability ceased. If it be held that under the facts shown in evidence, a delivery was not made, then our contention is that as the plaintiff alleged and proved that the cattle were damaged by an unprecedented flood, then to make a case, the plaintiff must allege and prove that the danger should have been foreseen by the exercise of ordinary foresight (not hindsight), and damage prevented by the exercise of ordinary care, that is, such foresight, care and prudence as men of business and heads of families usually exhibit in matters that are interesting to them. (*Railroad Company* v. *Reeves,* 10 Wall., 176, 191.) That instead of proving that by the exercise of ordinary care and foresight the injury would have been foreseen and avoided, the plaintiff proved that the

defendant's general superintendent and division superintendent, who had direct charge of the movement of the cattle, were in Kansas City, personally attending to the flood situation, making a trip to Argentine for that purpose, and receiving reports from Topeka. That they placed some of their most valuable equipment on tracks in their yards, near the stock yards, on ground lower than the stock yards, believing it was there safe, but where it was afterward submerged. That the defendant's best passenger train was caught and destroyed at the Union Depot. That their office was flooded and the records, which were easily removable, were destroyed. That no bank, railroad, packing house, wholesale house or other industry removed a dollar's worth of property, except the few mules, which were nearly drowned while being taken out. *That not one of the* 25,000 *people living in the flooded district foresaw or avoided the flood, but all lost practically everything.* As all this appeared from the plaintiffs' testimony, the defendant was not called upon to admit or deny negligence, or omission of duty. All it did do in defense was to introduce further evidence, making the fact more clearly appear that no one foresaw the danger or did anything to avoid it. As the Kansas City stock yard is a public yard, where all cattle are fed and cared for by the stock yards company, any failure to feed them was not the fault of the defendant, nor in fact of any one, as it was impossible to properly feed and care for them, as indeed was alleged in plaintiffs' petition in these cases.

On pages 53 and 54 of plaintiff's brief the claim is

made that there were practically no cattle in the stock yards, except those of the plaintiffs. Mr. Frost, one of the plaintiffs, testified there were 200 or 300 other cattle there. (Rec., 44.) Mr. Allen, one of the plaintiffs' witnesses, testified that several thousand hogs and sheep were in the stock yards during the flood. (Rec., 258.) They could have been driven out easier than could wild Texas cattle. The witnesses testified that the receipts of cattle were always light the latter part of the week (Rec., 85), and *as May 30th was Saturday and a legal holiday, there were, as could but be expected, but few cattle in the stock yards, and but very few of those were removed, and none of the hogs or sheep.* As there would be no market for cattle on those days there would be fewer cattle held there than on market days. It was a common thing for the traders to move out small bunches of cattle. (Rec., 258.)

Plaintiffs also say in their brief, on page 53, that there was no evidence to show that there were any cattle in the packing houses when the climax of the flood came. Neither was there any evidence that there were not cattle there. There was evidence that nothing was removed from any of the packing houses in anticipation of the flood.

On page 64 of plaintiffs' brief is this statement:

> "Anybody who is at all familiar with the Kansas City stock yards knows that it is in the west bottoms of Kansas City, and that the cattle in controversy could have been driven from those stock yards out to the pastures south of the city without going through any of the streets of either the business or residence portion of Kansas City."

We admit that the stock yards are in the west bot-

toms of Kansas City, but we deny each and every other portion of that statement. Immediately west of the stock yards is Kansas City, Kansas, with the Kansas river flowing east along the southern boundary to a point near the Missouri state line, where it turns north and flows along the west side of the stock yards. Immediately south of the Kansas river is a high bluff up which the cattle could not be driven, and upon which there was no place to keep the cattle if they were there. Immediately south of that bluff and between that and another bluff to the southeast of it is Turkey creek, with the City of Rosedale built along one street in that valley for a distance of two miles or more, there being no place where those cattle could have been driven except along that one street. Immediately east of Kansas City, Kansas, and Rosedale, lies Kansas City, Missouri, extending from the Missouri river on the north, for at least three miles south of the stock yards, and four or five miles east, solidly built up all the way. No witness testified that there were any pastures or yards in that vicinity sufficient to hold those cattle except Kapeck's pasture, six miles east of the stock yards, between Kansas City and Independence (Rec., 257), and to reach that pasture it would be necessary to drive the cattle through the center of the business and residence portion of Kansas City, Missouri, for at least four or five miles.

On page 77 of the plaintiffs' brief it is said that the defendant moved 1,300 or 1,400 cars from its yard at Argentine to the highest place where the cars could be placed at Kansas City. The testimony showed that the defendant had about 1,400 cars loaded with merchan-

dise in the yards at Argentine, but not one of those cars was moved, and there is not one word of testimony in the record that they were moved. The plaintiffs' attorneys made that assertion in argument before the Circuit Court of Appeals, and the correctness of the assertion was then challenged. They now repeat it to this court and we again challenge the truth of the statement. It is true Judge Pollock, in his written opinion mentions the removal of these cars, but that was a mistake, and his attention was then called to the mistake, and he said he would correct it, but by oversight, failed to do so. The only things that were removed from the Argentine yard were some engines and coaches, and they were placed in defendants' yard near the stock yards, on ground a little lower than the stock yards, where Mr. Sharp, the defendant's division superintendent, thought they would be perfectly safe, but where they were submerged and destroyed. Mr. Sharp testified that he did not think the contents of the 1,400 cars were in danger where they were as he thought the crest of the flood was then upon them when he was in Argentine on May 30th. (Rec., 601.)

On page 78 of their brief the "Tidal wave" fable is again repeated, but needs no further answer than that heretofore given.

On page 93 of their brief the plaintiffs say "There was not a single head of cattle in any of the Kansas City packing houses when the flood reached its climax." There is not a word of testimony to support that statement, and the statement has grown somewhat stronger than it was when made on page 54 of their brief.

On page 171 of plaintiffs' brief there is a strange

juggling of the telegrams to make it appear that Mr. Hurley was not acting in good faith with the Missouri Pacific road about delivering the stock at Kansas City. After correctly quoting Mr. Hurley's telegram to Mr. Clark, found on page 194 of the record, counsel try to pervert the language used so as to make it appear that the language "Cannot give you correct figures on it now," apply to the 19 cars, instead of applying it to the time of arrival of the balance of the 100 cars. That language with this meaning is used in other telegrams. (Rec., 182.)

Such juggling of evidence is not fair to court or counsel. The 19 cars there referred to were received by the Missouri Pacific road and placed in the stock yards as shown by Mr. Clark's telegram of May 29th immediately following the juggled telegram. (Rec., 194.) We think we have heretofore clearly shown by the telegrams that a contract was made or understanding arrived at for the Missouri Pacific to receive the cattle at Kansas City. Again on page 172 they attempt to construe the language "Cannot give you correct figures on it now," as referring to a division of freight charges between the roads. That is not what Mr. Clark had asked about. It is not what Mr. Hurley was answering. It is not what the language means. It is not a candid, straightforward construction of the telegram. The traffic departments of the two roads had already agreed upon the division of freight, as shown by Mr. Hurley's telegram to Mr. Gould on May 28th in which he says, "Your traffic dept. have advised our traffic dept. as to participation in rate." (Rec., 187.) And Mr. Hurley's telegram to Mr. Clark of May 28th

in which it is said: "The stock goes to you on revenue basis." (Rec., 185), probably referring to the regular agreed rates, filed with Interstate Commerce Commission.

On page 174 it is said that on May 30th about 8 o'clock the plaintiffs went to defendant's office and were there informed that the Missouri Pacific would take out the cattle, "Although Mr. Douthitt had informed him or his office that under no circumstances could the Missouri Pacific do any such thing." Mr. Douthitt had not so stated. He testified that he talked with defendants agents about the cattle at 8:30 A. M. (Rec., 271), and "We told them we did not have the power to handle that many trains of cattle without notice, that the indications were that we could not get them out under any circumstances; we would make an effort if the water was not any higher by noon to load one train that day." (Rec., 272.) Until near noon on that day they were endeavoring to get cars from the Santa Fe to forward the cattle. The order was given about 10 o'clock for the cars to be ready, but before they were sent over from Argentine, the Missouri Pacific decided not to take them. (Rec., 594.)

On page 176 the plaintiffs say the cattle were put on the viaducts on Saturday night, citing Mr. Steube, one of the plaintiffs for authority. Mr. Steube did attempt to so testify, but his testimony was stricken out because he said he was in bed and knew nothing about it only what he had been told. (Rec., 392, 393.) Mr. Frost, one of the plaintiffs testified that they were put on the viaducts on Sunday morning, May 31st be-

tween 10 and 11 o'clock. (Rec., 42.) We prefer to rely on testimony that was not stricken out.

On page 182 of plaintiffs' brief evidence of Mr. Douthitt is quoted to show that no waybills or orders for cattle were delivered to him, and that none of the cattle were delivered to the Missouri Pacific road. No one pretended that the waybills and orders were delivered to him, and no one pretends that he was present when a delivery was made. But it is conclusively shown by the testimony of those who delivered, and of Mr. Isitt, the Missouri Pacific freight agent, who received, that one train load of cattle in the cars, together with the waybills, was delivered to the Missouri Pacific road in its yard. The fact that Mr. Douthitt testified that no cattle were delivered, only proves the reckless manner in which he was willing to testify. And the fact that the waybills so delivered with that train load of cattle were found with the other waybills in the defendant's live stock office, taken in connection with the fact that the Missouri Pacific live stock office was on the same floor, and near the Santa Fe office, would tend to prove that all the waybills were delivered.

On page 183 of the defendant's brief it is asserted that after the flood the defendant took the cattle from the stock yards to pastures and from there to Atchison, as tending to prove that the defendant had not delivered the stock at Kansas City. Plaintiffs' counsel well know that such removal to pastures, and further transportation was under an arrangement between the plaintiffs and defendant that no rights were thereby waived or impaired.

In the petition for the writ of *certiorari* copied in plaintiffs' brief, pages 195, to 224, it is stated repeatedly, in different forms, that the contract for shipment of the cattle called for their shipment by way of Atchison. (Plaintiff' brief pages 200, 202, 203.) It is hardly necessary to repeat what we have before said, that the contracts do not call for shipment by way of Atchison, and no evidence was introduced showing that there was such a contract. The initial carrier for itself and connecting carrriers designated a route via Atchison, for their own guidance and prepared waybills accordingly, and those waybills were admitted in evidence for the sole purpose of showing that the initial carrier so routed them, and not as evidence that there was a contract to so route them (Rec., 120), and no exception was taken by plaintiffs to that ruling.

In the petition for the writ of certiorari it is said that one train load of the cattle were taken to Atchison, and there delivered to a connecting carrier and forwarded to destination, and the cattle in question might also have been so forwarded. (Plaintiffs' brief, page 208.) There is no evidence that those cattle went to Atchison or where they were delivered to a connecting carrier. Such statements should not be made without some evidence to support them. It is further stated in said petition that on Saturday evening, May 30th, the Burlington road took 35 cars of cattle out of Kansas City, north across the Kaw river and could have taken the cattle in question. (Brief, page 210.) The Burlington agent testified that the 35 cars of cattle were sent east, not north (Rec., 290), and that he

did not know whether or not they had equipment to handle the cattle in question. (Rec., 288.)

The confusing, misleading and unfair presentation of the plaintiff's case in their petition for the writ of certiorari and in the statement of facts and brief, such statements of fact in many material matters being wholly unsupported by any evidence, or directly contrary thereto, has made it necessary to make this statement longer than otherwise would have been necessary. Indeed many of the statements are wholly irrelevant and immaterial so far as the real controversies are concerned. The same is true of much of the evidence. As we shall show in the argument, the questions of fact necessary to be considered in a proper determination of these cases will be found to be few and to fall within a very narrow compass.

ARGUMENT.

I.

ONLY TWO ASSIGNMENTS OR SPECIFICATIONS OF ERROR CAN BE CONSIDERED. (1) THE DIRECTION OF THE TRIAL COURT TO THE JURY TO RETURN A VERDICT FOR THE DEFENDANT UNDER THE EVIDENCE. (2) THE REFUSAL OF THE TRIAL COURT TO PEREMPTORILY INSTRUCT IN FAVOR OF THE PLAINTIFF. ALL OTHER ERRORS HAVE BEEN ABANDONED; NONE OTHERS ARE PROPERLY ASSIGNED SPECIFIED OR PRESENTED TO THIS COURT, NOR WERE THEY PRESENTED TO THE CIRCUIT COURT OF APPEALS.

The first error specified is alleged error of the court in refusing to direct the jury to find for the plaintiffs. This specification is probably too broad under the ruling in *Grand Trunk Ry.* v. *Ives,* 144 U. S., 415 and 416.

The second specification is alleged error in refusing to give instructions numbered 1 to 13, inclusive, requested by plaintiffs. None of these requested instructions, however, were proper or correct, and the assignment or specification, covering generally a number of instructions, was contrary to rule 11 of the Circuit Court of Appeals and is contrary to the rules of this court. The burden should not be placed upon us or upon the court to hunt for supposed error in any one of these numerous instructions or to point out wherein each of the instructions rejected is erroneous and, therefore, was properly rejected or refused. Under Section 997, United States Revised Statutes, as well as under the rules of the Circuit Court of Ap-

peals and of this court, the assignment of errors must be filed with the clerk of the court below with a petition for the writ of error or appeal. Each error assigned must be specifically set out under a separate assignment so as to advise the opposite counsel and the court of the particular legal points relied upon for the reversal of the trial court.

See:

Lloyd v. *Chapman*, 93 Fed., 599.

United States v. *Indian Grave Dist. et al.*, 85 Federal, 928-932.

Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S., 128.

Supreme Council C. K. of A. v. *F. & C. Co.*, 11 C. C. A., 97; 63 Fed., 48.

The third specification is alleged error in directing the jury to return a verdict for the defendant. This assignment is as broad as the first.

The fourth specification is nothing more than the first and third, referring merely to the opinion of the court in ruling upon the requests for peremptory instructions. No exception was taken to the part of the opinion quoted and no error could be predicated upon a portion of an opinion.

The fifth assignment is directed to the opinion of the majority of the Circuit Court of Appeals to the effect that in joining in peremptory requests the plaintiffs submitted the case to the court to find the facts. Even if there had been error in this course it would not at all follow that the judgment of the trial court should be reversed.

II.

AS EACH PARTY ASKED FOR A PEREMPTORY INSTRUCTION IN ITS FAVOR AND ARGUED AND SUBMITTED SUCH INSTRUCTIONS TOGETHER TO THE COURT, AND THE COURT DETERMINED THE SAME, IT MUST BE ASSUMED THAT THEY BOTH SUBMITTED THE CASE TO THE COURT TO FIND THE FACTS UPON THE ASSUMPTION THAT UNDER THE EVIDENCE THERE WAS ONLY INVOLVED A QUESTION OF LAW AS TO LIABILITY OR NONLIABILITY.

The record in the case under consideration discloses on page 637 the following:

> "And thereupon, upon the conclusion of all the evidence in the case, the plaintiffs prayed the court to instruct the jury as follows: 'The court instructs the jury *to find the issues for the plaintiffs,*' which instruction the court refused to give and which action, ruling and decision of the court in refusing to give said instruction the plaintiffs at the time duly excepted."

The defendant requested a similar instruction in its favor. (See record, pp. 27 and 26, for requests for peremptory instructions filed and submitted.)

It is obvious from the "memorandum of decision on request for peremptory instructions" found on pages 645 and 655 and which is made a part of the record in the bill of exceptions, that the two instructions were submitted together and disposed of by the court. On page 655 of the record it is stated at the end of the decision:

> "It, therefore, follows on the main case the request for instructions to the jury to return a verdict for the defendant must be sustained and the

like request of plaintiffs must be denied. This will be done. And *thereupon* the court, on the motion of the defendant, gave final judgment in favor of the defendant and against these plaintiffs."

It, therefore, appears from page 637 of the record that the plaintiffs asked the court to direct the jury to find the issues for plaintiffs and only *after* this instruction or motion had been refused and the peremptory instruction requested by the defendant had been given, as shown by the "memorandum of decisions," that "*thereupon* the plaintiffs prayed the court to give to the jury the following instructions," (Rec., 638), and there are then set out some thirteen instructions requested, the refusal to give any one of which instructions was never properly assigned or specified as error for the consideration of the Circuit Court of Appeals or for this court, and must therefore be regarded as having been abandoned or it must be assumed that each request was incorrect or erroneous and, therefore, properly refused.

It therefore, fairly appears from the record that plaintiffs did not ask to go to the jury upon any special question of fact until *after* the case had been submitted to the court and the court had plainly found the issues against plaintiffs and directed a verdict for the defendant.

Moreover, owing to failure to properly assign error, there was not for the consideration of the Circuit Court of Appeals any request of plaintiffs to submit the case to the jury upon any question of fact.

The third assignment of error (record page 658) is as follows:

> "The court erred *after the refusal of said peremptory instruction* in refusing to give and charge the jury at plaintiffs' request instructions numbered as follows and in refusing to give each of them to-wit: Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13."

Under rule 11 of the Circuit Court of Appeals as well as under the rule of this court, each error assigned must be specifically set out under a separate assignment so as to advise the opposite counsel and the court of the particular legal points relied upon for a reversal of the trial court. (See authorities cited under previous heading.)

It could be readily shown if necessary that the fifth instruction requested by plaintiffs, found on pages 639 and 640 of the record, in regard to alleged deviation of the shipment was clearly erroneous and was properly refused. The only alleged errors, therefore, properly assigned and which were for the consideration of the Circuit Court of Appeals were refusal of the trial court to give plaintiffs' peremptory instruction and the giving of defendant's peremptory instruction.

From the record it plainly appears that both plaintiffs and defendant submitted the entire case to the court to determine the facts under the evidence and the law applicable thereto, as to whether the verdict and judgment should be for the plaintiffs or for the defendant. While plaintiffs urged in their petition as reasons for liability several grounds of negligence, there was but one cause of action stated, and plaintiffs

contended that upon all the evidence they were entitled to a verdict and judgment upon this cause of action, while defendant contended that the verdict and judgment upon all the evidence should be in its favor. There was involved in these motions the legal conclusion of liability or nonliability.

A motion for an instruction to find a verdict for a party has superseded the old practice of a demurrer to the evidence, but is nevertheless analagous thereto.

Merrick's Executor v. *Giddings,* 115 U. S., 305.

Parks v. *Ross,* 11 Howard, 373.

There was a joinder in demurrer to the evidence.

Plaintiffs did not, in their peremptory instruction, submit the case upon any particular point or question, but joined with the defendant in submitting the entire case upon all the evidence to the court.

In *Beuttell* v. *Magone,* 157 U. S., 154, it is said:

> "As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. *This was necessarily a request that the court find the facts,* and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

Bankers' Mutual Casualty Co. v. *State Bank of Goffs,* 150 Federal 78 (8th Circuit).

City of Defiance v. *McGonigale,* 150 Fed. 689, (6th Circuit).

To the same effect see

Johnson's Admr. v. *C. & O. Ry. Co.*, 21 S. E., 238; 91 Va., 171.

Having thus submitted the case to the court to determine the facts from the evidence, and the court having acted upon such request and decided the questions of law and fact, plaintiffs were not in a position to insist that such submission should thereafter be ignored or withdrawn and that the case should then be submitted to the jury (after the peremptory instruction had been given) to determine some particular question or fact.

Such was the ruling of the Circuit Court of Appeals for the Seventh Circuit in *Insurance Company* v. *Wisconsin Central Ry.*, 134 Fed., 794 and 798.

See also the reasoning and authorities cited in the opinion of the Circuit Court of Appeals in this case—*Empire State Cattle Co.* v. *A. T. & S. F. Ry. Co.*, 147 Fed. Rep., 459, *et seq.*

See also

Nashville, C. & St. L. Ry. Co. v. *Sansom*, 84 S. W., 615-616; 113 Tenn., 683.

Such also was the ruling of the New York Court of Appeals in *Howell* v. *Wright*, 25 N. E., 912. In none of the cases from the Federal Courts cited by the petitioners has a different decision been made.

In *Signa Iron Co.* v. *Greene*, 31 C. C. A., 477 (cited by opponents) motions by both parties for a verdict were denied and the court, over the exception of one party, submitted a single issue of fact to the jury.

In *Merwin* v. *Magone,* 17 C. C. A., 361 and in *Magone* v. *Origet,* 17 C. C. A., 363, the direction of a verdict by the trial court was affirmed. The same is true of the case of *Chrystie* v. *Foster,* 9 C. C. A., 606.

These cases cannot be regarded, therefore, as authoritative decisions in favor of our opponents.

The case of *Minahan* v. *Grand Trunk Ry.,* 138 Fed., 37 (cited by opponents) is distinguishable. There, in an action, where the facts were not conceded, plaintiff interrupted the court as it was passing on a motion to direct a verdict for the defendant, and asked leave to file certain requests to charge the jury, one of which was a request for a peremptory instruction for plaintiff, and the court permitted such requests to be filed, and assured counsel that he should have the benefit of them. It was held that this did not amount to a submission of the issues of fact to the court so as to preclude plaintiff from objecting to an adverse finding thereon. The plaintiff in that case plainly indicated that the case was not intended to be submitted to the court for its decision only upon the peremptory instruction, and it appeared that the evidence was quite conflicting on material points. Moreover, the court in that case is at pains to point out that its decision was in accordance with the practice in Michigan, where the case was tried.

Moreover, a request to go to the jury must specifically point out the question of fact upon which its judgment is desired. It is settled even in the New York courts, whose decisions are relied upon by our opponents, that a request must be in such form that

the judge may properly charge in the terms of the request, without qualification.

Carpenter v. *Stillwell,* 11 N. Y., 61 and 79.
Winchell v. *Hicks,* 18 N. Y., 565.
Van Akin v. *Caler,* 48 Barbour's Supr. Ct. Rep., 60 and 61.
Waters v. *Marrin,* 13 Daly's Repts., 57.

Therefore, even according to the rule of practice in the New York courts, whose decisions are relied upon, where both parties ask for the direction of a verdict, a motion by one of them to withdraw his request and go to the jury on the case in general will not be granted.

Groves v. *Acker,* 33 N. Y. Suppl., 406; s. c., 85 Hun., 492.

Now, having failed to assign error in the refusal to give any one of the thirteen specific instructions afterwards requested by plaintiffs, they must be deemed to have abandoned any question of error if any in regard to the same and certainly to have waived their right to predicate any error upon the refusal of the trial court to give any one of such instructions. They cannot now claim that they were entitled to go to the jury upon any particular question of fact since it does not appear, and they were not able to show, that any specific request in respect to the submission of any particular question of fact was properly made. The result, therefore, now is that they are simply claiming that after the court overruled their peremptory request and directed a verdict in favor of the defendant, the court erred in not submitting the case *generally*

to the jury. There was, therefore, no question before the Court of Appeals and there can be none before this court in respect to any improper refusal of the trial court to submit to the jury at the request of the plaintiffs some particular question of fact for its determination. Under the above rule, therefore, no such request to submit the case to the jury upon any particular question of fact involved was up for the consideration of the Circuit Court of Appeals, and there can be none, therefore, for the consideration of this court on *certiorari.* It is to be presumed that the action of the lower courts was rightful.

It would seem to be absurd to say that, if under the ruling of this court in *Beuttell* v. *Magone, supra,* where both parties asked the court to instruct a verdict, it was held that this was necessarily a request that the court find the facts and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given, after such submission and the decision of the court thereon the party defeated would still have the right to say that the court erred in finding the facts and in not submitting the case generally to the jury upon some question which might *thereafter* be discovered by the defeated party. The rule adopted by the Circuit Court of Appeals is a reasonable one and tends to certainty in the law.

III.

NEVERTHELESS, AS THE EVIDENCE WAS OF SUCH A CONCLUSIVE CHARACTER IN FAVOR OF THE DEFENDANT THAT THE TRIAL COURT WOULD HAVE BEEN OBLIGED TO SET ASIDE A VERDICT IN FAVOR OF PLAINTIFFS, IT THEREFORE PROPERLY DIRECTED A VERDICT FOR THE DEFENDANT. THIS IS TRUE NOT ONLY IN RESPECT TO ANY QUESTION OF ALLEGED NEGLIGENCE BUT ALSO IN RESPECT TO THE QUESTION WHETHER SUCH ALLEGED NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE DAMAGE AND ALSO WHETHER THERE WAS ANY WRONGFUL DEVIATION FROM INSTRUCTIONS, IF ANY, OF THE SHIPPER OR FROM ANY ALLEGED AGREEMENT OF DEFENDANT.

If, as a matter of practice, the majority of the Circuit Court of Appeals may have erred in determining that the case had been submitted to the trial court by the parties to find the issues, yet the judgment in the trial court in favor of the defendant should not be reversed unless clearly erroneous. If the case for any reason was rightly decided by the trial judge, his judgment should not be disturbed because of some alleged error of practice adopted by the Circuit Court of Appeals, since substantial justice between the parties has been done.

West v. *Camden*, 135 U. S., 508.

The writ of *certiorari* merely brings up the record in the Circuit Court of Appeals to this court. These cases involve trials at common law, so that the only power or jurisdiction of the appellate courts is to determine from the record made in the trial court whether

prejudicial error was committed during the trial by reason of which an erroneous verdict and judgment was rendered. If the judgment in the trial court was right it ought not to be disturbed. No one can be prejudiced by letting it stand.

The trial judge, as well as Judge Sanborn in the Circuit Court of Appeals, reviewed the evidence and found that the same was of such a conclusive character in favor of the defendant that a verdict in plaintiffs' favor could not be sustained.

It is well settled in the Federal Courts that it is the duty of the trial judge to direct a verdict in favor of a party when, if the verdict were against such party as rendered by the jury, it would be the duty of the court to set the same aside and grant a new trial, and that the court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed *or of such a conclusive character* that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict in opposition to it.

See

Southern Pacific Co. v. *Pool*, 160 U. S., 440.
Goodlander Mill Co. v. *Standard Oil Co.*, 63 Fed., 400.
Christenson v. *Metropolitan St. Ry. Co.*, 137 Fed., 708.

This rule is recognized in the case cited by our opponents,—*Marande* v. *R. R. Co.*, 184 U. S., 191.

Such a rule tends to certainty and is of great advan-

tage not only to the bar but to litigants who should be enabled to be advised with some degree of certainty as to their rights or liabilities.

In *Bowditch* v. *Boston*, 101 U. S., 18, it is said:

> "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. *It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice.* (*Merchants' Bank* v. *State Bank*, 10 Wall., 604, 637; *Improvement Company* v. *Munson*, 14 id., 442; *Pleasants* v. *Fant*, 22 id., 116.)
>
> "The rule in the English courts is substantially the same. (*Ryder* v. *Wombwell*, Law Rep., 4 Ex., 32; *Giblin* v. *McMullin*, Law Rep., 2 P. C., 335.) In the latter case it was said: 'In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the *onus* of proof is imposed.'"

Also in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S., 658, which involved a question of negligence, Mr. Justice Brewer said on page 660:

> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of

testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

It is, however, contended by our opponents that under the decision of this court in *Ry. Co.* v. *Stout*, 17 Wallace, 657, and in *Milwaukee, &c., Ry.* v. *Kellogg*, 94 U. S., 469, both the question of negligence and proximate cause must always be submitted to the jury. That, of course, is not true, as many rulings of this court will show. It is only where a reasonable inference of negligence or of proximate cause may be drawn from the facts that such questions may in appropriate cases be submitted to the jury. In the former case cited, known as the Turntable case, the railway company left unguarded and unlocked a turntable in a locality frequented by children and upon which children were apt to play, and the case involved injury to a child while his associates were playing upon and moving the turntable. The appliance was known to be attractive to children. The danger to them in leaving it unfastened, by reason of which they were likely to put it in motion, might have been expected. The injury was one which might have been reasonably anticipated by the railway company. The inference of negligence was one which

any reasonable mind might well draw. In the other case the railway company negligently set out a fire in the operation of its railroad and the fire, by reason of a high wind, spread from one building to another. It was claimed that the burning of the second building was a remote result of the setting out of the fire. There was nothing unprecedented about the result, however, and in that case it was but reasonable to infer that the railway company might have anticipated as the result of setting out of the fire in such weather that the same would spread indefinitely.

It is, however, well settled that an inference of negligence cannot be based on a presumption nor on speculation or conjecture.

Leonard v. *Miami Min. Co.*, 148 Fed., 827.

In *Pennsylvania R. R. Co.* v. *McCaffrey*, 149 Fed., 404, plaintiff's evidence was that she, while a passenger, was injured by a missile, a bolt with a nut, entering an open window on the side next to a passing freight train; there was evidence that the missile was thrown through an open window on the opposite side of the car by one of several boys who were pelting the train as it went by. *Held*, that the court properly directed a verdict for the defendant. On page 406 it is said:

> "Undoubtedly, it commonly is within the province of the jury to decide an issue as to negligence by drawing the reasonable inference from the primary facts. *But reasonable inference is one thing, and mere guess or arbitrary surmise is another and very different thing*, and though it may be that the evidence for the plaintiffs, *if alone considered*, would have warranted a sus-

> picion that in some way or other the moving freight train was responsible for Mrs. Caffrey's hurt, yet it is plain that, *from the evidence as a whole,* no more explicit deduction could have been properly made than that the missile which struck her came either from that train or from one of the boys that have been referred to. The jury, however, was allowed to conjecture that it came from the train and upon that conjecture merely to base the further finding, also an inferential, though a legal one, that the defendant had been guilty of negligence. We think this should have been prevented by granting defendant's request for a directed verdict."

In *Charnock* v. *Tex. & Pac. Ry. Co.,* 194 U. S., 432-438, this court determined, in affirming the ruling of the Circuit Court of Appeals, in 113 Federal, 91, as a matter of law that defendant was not guilty of negligence in failing to take certain precautions to prevent a loss by fire, which plaintiffs claimed ought to have been taken.

Many cases might be cited in which this court determined that, as but one inference could be reasonably drawn from the evidence, the defendant in the case involved was not guilty of negligence as a matter of law.

> *Dist. Columbia* v. *Moulton,* 182 U. S., 576, 579.
> *Elliott* v. *C., M. & St. P. Ry.,* 150 U. S., 245, 246.
> *Randall* v. *B. & O. Rld.,* 109 U. S., 478, 482.

In *Metropolitan Ry. Co.* v. *Jackson,* Law Rep., 3 App. Cases, 193 cited with approval by this court in *Randall* v. *B. & O. R. R. Co.,* 109 U. S., 482, and which

involved injury to a passenger by slamming a car door to by a railway porter, it was said on page 197 by Lord Chancellor Cairns:

> "The judge has a certain duty to discharge, and the jurors have another and a different duty. *The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred;* the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

He then goes on to show on page 198 that prior negligence in not attempting to remove an extra and inconvenient number of passengers from the carriage and failure to control the action of a number of persons on the platform was not connected with the accident, and, therefore, immaterial. Of such negligence he says, page 198:

> "It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria trans locum injuriae.*

Or, as stated in the concurring opinion of Lord Blackburn, on page 210, such negligence, within a maxim of Lord Bacon's, was remote.

A judgment given for the plaintiff in that case was thereupon reversed and a non-suit ordered to be entered.

So, also, the question of proximate cause becomes a question of law where the casual connection of defendant's alleged negligence with the loss or damage complained of is evidently not proximate.

See

Goodlander Mill Co. v. *Standard Oil Co.*, 63 Fed., 400 (C. C. A., 7th Circt).

Also authorities cited in the dissenting opinion of Judge Sanborn of *Southern Pacific Co.* v. *Yeargin*, 109 Fed., 443-444.

In *Seymour* v. *Union Stock Yards, etc.*, 224 Ill., 579, it was held that whether there is any evidence that the negligence charged is the proximate cause of the injury complained of is a question of law.

As we shall show hereafter the damage in question was directly caused by the unexpected inundation of the Union Stock Yards and as this was caused by an unprecedented, extraordinary and sudden flood in the Kansas river at Kansas City,—an unprecedented rise in the same which no one anticipated,—defendant could not be held in duty bound to anticipate the same and was, therefore, not liable. As we shall show hereafter, the question of whether the alleged negligence under the evidence was culpable or actionable or not.

So, while it was alleged in the petition that the alleged wrongful deviation to Kansas City was negligence, yet the question whether there was any wrongful deviation from any instructions of the plaintiffs or

from any contract of the defendant was also a question of law for the court. Thus, in *Crosby* v. *Fitch*, 12 Conn., 410, which is relied upon by our opponents, upon the question of wrongful and unnecessary deviation from the contract of carriage it was said on page 421:

> "It is claimed, to be sure, that this was a question of fact; and as such, ought to have been submitted to the jury. We have ever supposed, that upon given facts, whether deviation or not, was a question of law; and so we find it treated in all the cases. *Suydam* v. *Marine Ins. Co.*, 2 Johns. Rep., 138. *Graham* v. *Commercial Ins. Co.*, 11 Johns. Rep., 352. *Brown* v. *Betts*, 9 Cowen, 208. *Newell* v. *Hoadley*, 8 Conn., Rep., 381."

Even a departure or deviation from an express agreement to forward by a particular route or to carry in a particular manner is not wrongful unless it appears that such deviation was *unnecessary* or *unjustifiable* under the circumstances. In the case at bar there were no instructions of the shipper nor any express agreement departed from.

IV.

IN PASSING ON THE RULING OF THE TRIAL COURT IN DIRECTING A VERDICT FOR DEFENDANT, IT WOULD NOT BE PROPER TO CONSIDER EVIDENCE OR TESTIMONY WHICH WAS STRICKEN OUT OR NOT ADMITTED BY THE COURT, AS THE RULINGS IN THAT RESPECT COULD ONLY BE CONSIDERED UNDER SEPARATE AND DISTINCT ASSIGNMENTS IN ACCORDANCE WITH THE RULES OF THE CIRCUIT COURT OF APPEALS AND OF THIS COURT.

It is contended that in considering the assignment of error on the ruling of the trial court in giving or

refusing a peremptory instruction, this court must consider alleged evidence or offers of evidence which were rejected by the trial court. A great deal of such rejected evidence is referred to in opponent's brief. It is difficult to understand how such rejected evidence could be considered on an assignment predicated upon alleged error in instructing the jury to return a verdict for the defendant under the evidence introduced or admitted. What this alleged rejected evidence was is not pointed out. The error of the court, if any, in refusing to admit the same was never properly assigned as error and was never insisted upon in plaintiffs' brief or argument by any specification of error.

The rulings of the trial court in rejecting such evidence could only be considered under an assignment specifically directed to such rulings and the full substance of the evidence or offer of the same would have to be set forth. It must be assumed that the ruling of the lower court was correct and the evidence properly rejected in each instance, and, as no specific assignment or specification has been made in respect to such rulings, that plaintiffs have acquiesced in the correctness of the same. The offer, if made, may not have been proper or broad enough and the evidence rejected may not have been competent; no proper exception may have been taken. In any event it is not for us to point out wherein the rulings of the court in that respect were correct since that would unnecessarily prolong this brief and since such rulings are not properly made the subject for consideration here.

See

Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S., 128.

There is no error in withdrawing a case from the jury where there is no *competent* evidence upon which a verdict could be based.

See

Supreme Council C. K. of A. v. *F. & C. Co.*, 11 C. C. A., 98.

It is, however, contended that the ruling in *Ry Co.* v. *Harris*, 12 C. C. A., 598, justifies plaintiffs' contention. But the plaintiff in that case offered, and was ready, to produce *competent* evidence to prove a material fact in issue. The court rejected it on defendant's objection. Defendant afterwards claimed that the court erred in submitting this issue to the jury on the ground that there was no sufficient evidence thereon. It was held that defendant could not complain of such submission upon that ground, as the action of the court was induced by defendant's objection and defendant was therefore estopped from questioning the action of the court in submitting that issue to the jury.

Defendant, in this case, however, is not complaining of any ruling of the court and no estoppel can therefore arise against it.

V.

ALL CHARGES OF NEGLIGENCE MADE BY PLAINTIFFS ARE BASED UPON THE ASSUMPTION THAT THE DEFENDANT, PRIOR TO THE MORNING OF MAY 31ST, SHOULD HAVE KNOWN AND ANTICIPATED THAT WHICH NO ONE ELSE AT KANSAS CITY IS SHOWN TO HAVE KNOWN OR ANTICIPATED, VIZ.: THAT THE FLOOD WHICH THEN REACHED THE KANSAS CITY STOCK YARDS WOULD BE SO UNPRECEDENTED, EXTRAORDINARY AND SUDDEN AS TO CAUSE THE DAMAGE COMPLAINED OF TO THE CATTLE BY REASON OF INABILITY TO FEED AND CARE FOR THE SAME AFTER BEING DRIVEN UPON THE VIADUCTS.

Plaintiff's petition plainly stated that defendant, in order to save the cattle from being drowned, drove them into the viaducts extending over the pens and above the waters, and that the waters made by the flood extended from May 31st to June 7th, 1903, back from said pens a distance of three-quarters of a mile and more, and were of a depth of from 8 to 15 feet, and that in consequence of said waters and of the placing of said cattle in said viaducts, it was impossible to feed or water them during said period of seven days. It is then charged that the damage complained of resulted from insufficient feeding and watering.

The grounds of alleged negligence are summed up in the petition as follows:

> "Plaintiffs further state that it was the duty of said defendant as such railway company and common carrier *to exercise due and reasonable care* in the carriage and transportation of said cattle from Amarillo, Texas, to said Atchison,

Kansas, but that defendant was *guilty of negligence in the following particulars,* to-wit:

"(1) Defendant did not exercise *due and reasonable care,* but was *negligent* in the detention of said cattle at Strong City from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been, by defendant at said Atchison, Kansas, delivered to the continuing and connecting carrier at that point.

"(2) Defendant did not exercise *due and reasonable care* in the transportation and carriage of carriage of said cattle but was *negligent* in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

"(3) Said defendant did not exercise *due and reasonable care,* but was *negligent* and acted wrongfully and without plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City from which last point and city defendant had and has no connecting line extending to Atchison, Kansas.

"(4) Defendant did not exercise *due and reasonable care* in the transportation and carriage of said cattle by *carelessly and negligently* endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river at the mouth thereof several days after the rise and increase of the flood of said Kaw river. And plaintiffs say that defendant, by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so de-

posited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

"(5) That defendant having wrongfully transported said cattle to Kansas City, as aforesaid, *carelessly and negligently failed and neglected* to move or cause to be moved the same from their position of peril, aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

"(6) Defendant did not exercise *due and reasonable care* but was *negligent* in not properly or sufficiently feeding or watering said cattle before loading the same at said Strong City, Kansas, and while said cattle were in the viaducts at Kansas City.

"Plaintiffs further state that said several injuries, damages and losses to and of said cattle hereinbefore specified and set out were each and all *caused by the said several negligences and want of due and reasonable care* in the transportation and carriage of said cattle by defendant." (Rec., 7 and 8.)

These grounds of negligence may be briefly summed up as follows:

(1) In detaining the cattle at Strong City and Wellington for two days and in not carrying them on May 27th to Atchison by way of Topeka for delivery to a connecting carrier at that point, by reason of which, in the subsequent transportation to Kansas City, they were overtaken at the latter place by an unprecedented flood.

(2) In not detaining the cattle at Strong City on May 29th until the flood in the Kaw river had subsided (yet it is inconsistently claimed in opponent's brief that the Burlington road shipped cattle out from the stock yards at Kansas City on the evening of May 30th, showing that up to that time

plaintiffs considered these yards to be a safe place for cattle).

(3) In negligently deviating the shipment without plaintiffs' consent to Kansas City, from which point defendant had (as alleged, though contrary to the fact) no connecting line extending to Atchison. (The Missouri Pacific was a connecting line which did extend to and beyond Atchison.)

(4) In endeavoring to head off the alleged approaching flood by taking the cattle to the Kansas City Stock Yards. (This is subject to the same criticism as (2).

(5) In failing to move the cattle from their alleged position of peril at Kansas City, "as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood."

(6) In not sufficiently feeding or watering the cattle before loading the same at Strong City and while they were on the viaducts at Kansas City. (There was no evidence whatever to justify either of these charges and the petition itself alleged impossibility to feed and water the cattle upon the viaducts.)

An examination of all the evidence shows that there was no justification whatever for any of these charges. It was necessary in the first place to hold the cattle at Strong City and Wellington because of inability or refusal of the Burlington Railroad to then receive the same at Atchison if they had then been forwarded. As there were no stock yards at Atchison in which these cattle could be held until the Burlington road could take them, defendant would have been negligent and liable for resulting damages, if it had attempted to take the cattle then to Atchison, where they could not be properly cared for. This necessitated subsequent negotiations with a connecting line at Kansas

City, the line between Atchison and Topeka in the meantime becoming impassable. The subsequent charges of negligence are all predicated upon the assumption that the defendant in the exercise of reasonable foresight and precaution had not anticipated, prior to the morning of May 31st, that the flood in the Kaw river would become so extraordinary and unprecedented as to submerge the stock yards, which had never theretofore been submerged, thus necessitating the driving of the cattle upon the viaducts to prevent their being drowned, as alleged in the petition. Those viaducts were apparently as safe a place as any under the circumstances, and the Stock Yards Company, in whose custody the cattle were, had the right to assume that the flood would recede about as rapidly as it had approached and that the stock could be taken from the viaducts within a day or two at most. No one else in that vicinity was shown to have anticipated prior to May 31st that the rise in the river would be so extraordinary, unprecedented and sudden as to endanger the Kansas City stock yards and the cattle therein. If defendant in the exercise of such foresight as was exercised by people generally in the vicinity of Kansas City, was not bound to reasonably anticipate that sometime during the night of May 30th or the morning of May 31st the flood would come on then to an unprecedented height so as to inundate the stock yards, which had never theretofore been inundated, so far as known, it certainly could not be held to be either negligent or careless in taking the stock to the Kansas City stock yards for delivery to a connecting carrier. Neither was there any negligence in the stock yards

company, in whose custody the cattle then were, in driving the same upon the viaducts, as that seemed to be about as safe a place as any, and anyone would suppose that the waters would recede about as rapidly as they had approached.

As the shippers were becoming impatient at the detention of the cattle at Strong City and Wellington, which detention was due to inability of the Burlington Company to then receive them at Atchison, defendant was acting in the best of faith and, under the circumstances, was exercising reasonable care, and acting under a well established custom or practice, in arranging with The Missouri Pacific Railway Company to receive the cattle at Kansas City and in transporting the same to and depositing them in the Kansas City stock yards for such connecting carrier. It was advisable to forward the cattle towards their destination as soon as practicable, and that is what the shippers, particularly Mr. Frost, wished to have done. A loss having occurred from an unexpected source, they now attempt to saddle the responsibility upon the defendant, whose agents were acting in the utmost good faith and with all due care and diligence in the light of the knowledge then possessed by them.

VI.

THE OVERFLOWING OF THE KANSAS CITY STOCK YARDS BY THIS FLOOD BEING SUDDEN, EXTRAORDINARY AND UNPRECEDENTED, DEFENDANT CANNOT BE HELD LIABLE FOR DAMAGES CAUSED IN CONSEQUENCE THEREOF AS IT COULD NOT BE EXPECTED TO ANTICIPATE THE UNUSUAL CHARACTER OF THE SAME. THE ANTECEDENT DELAY AT STRONG CITY AND WELLINGTON, AS WELL AS THE TAKING OF THE CATTLE TO AND DEPOSITING THE SAME IN THE UNION STOCK YARDS FOR THE CONNECTING CARRIER WAS NOT CULPABLE NEGLIGENCE, AS IT COULD NOT BE ANTICIPATED AT THE TIME THAT THE DISASTER COMPLAINED OF WAS LIKELY TO RESULT FROM ANY OF THE PRECEDING ACTS OF THE DEFENDANT. SUCH A DISASTER WAS NOT THEN PROBABLE.

Every charge of negligence is based upon the assumption that the defendant, prior to the actual inundation of the Kansas City stock yards, knew or should have known that it would be dangerous to take the cattle to and deposit the same in such yards. In other words, that the defendant should have anticipated what nobody else in that locality did anticipate, viz.: that the rise in the Kaw river would become so great, extraordinary and be so sudden as to inundate these yards and the locality thereabouts from 8 to 15 feet, and that such flood waters would not recede for seven days. No such flood within the knowledge of the oldest inhabitant had occurred before. The stock yards where the cattle were deposited had never been inundated or endangered. Floods in that river had occurred before but none so unusual, unprecedented, extraordinary or sudden as this one. (See, also, opinion

of Kansas City Court of Appeals, in *Lightfoot* v. *St. L. & S. F. Ry.*, 104 S. W. Rep., 483, hereafter quoted.) It is true that certain portions of the defendant's railway, as at Holliday and near Lawrence, as well as a part of the line between Topeka and Atchison, were submerged on May 29th, but this had occurred on other occasions of spring floods. Plaintiffs' brief would leave the impression that all portions of defendant's line to Kansas City was then inundated and dangerous, which was not at all true.

It was alleged in plaintiffs' petition, and was an uncontroverted fact, that the inundation of the Kansas City stock yards, on and after May 31st, prevented the feeding and watering of the cattle upon the viaducts, and was thus the cause of the damage complained of. This flood caused considerable loss of life and of millions of dollars worth of property. It was of such an unprecedented character that no one could have been reasonably required to have anticipated the same. It was unquestionably such an act of God as would exempt the carrier from liability in the absence of culpable negligence after the danger become apparent. It was of such an extraordinary character as to have become historical. (*Lightfoot* v. *Lightfoot* v. *St. Louis & San Francisco R. Co.*, 104 S. W., 483.)

The antecedent delay, if any, in the transportation of the cattle was but an incident, in no sense the cause, of the damage. By reason of the subsequent transportation to Kansas City it merely afforded an occasion for the shipment to be overtaken by this disaster. If the defendant had been more negligent in delaying the

transportation the damage would not have happened. In respect to various other shipments, which the defendant was more diligent in transporting, such diligence resulted in bringing many such shipments within the action of this catastrophe.

As under the written contract (see paragraph "*First*" of same), however, the defendant was not required to transport the cattle within any certain time, and as they were not intended for the market but simply for feeding pastures, it could not be held negligent in any event in holding the cattle at Strong City or Wellington. The evidence shows that the cattle were held there on account of the condition of the Burlington Railroad, and because delivery could not then be made to that company at Atchison.

Undoubtedly the direct and proximate cause of the damage complained of was this flood. It was the efficient and *dominating* cause of the damage, the *causa sine qua non.*

Insurance Co. v. *Boon*, 95 U. S., 130-131.

Liability for negligence depends on the probability of the consequences complained of, that is, its capability of being foreseen by a reasonable man. A party is usually held liable for those consequences which usually flow from his act or omission, and which as a reasonable man, in the light of the circumstances surrounding him, he may foresee as likely to result from such act or omission. The doctrine of proximate and remote cause is peculiarly applicable to and indeed constitutes a part of the definition of negligence.

Speaking of this rule, Sir Frederick Pollock, in his work on the Law of Torts, says on page 36:

> "The doctrine of 'natural and probable consequences' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight. It has been defined as 'The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now, a reasonable man can be guided only by a reasonable estimate of probabilities. *If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, no human affairs could be carried on at all.* The reasonable man, then, to whose ideal behavior, we are to look as the standard of duty, will neither neglect what he can forecast *as probable nor waste his anxiety upon events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.* This being the standard, it appears that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

The above principle was applied by the House of Lords in *Daniel* v. *Directors, &c., of the Metropolitan Railway Company*, L. R., 5 Eng. & Ir. App. (House of Lords), 45, where it was held that a railway company was not liable for injury to a passenger caused by the falling of a girder upon a passing train, the girder falling while being moved over the railway tracks by contractors doing certain work for the City of London, which was authorized to execute such works over

the railway, it being held that this was not such a mischief the occurrence of which the railway company was bound to anticipate and against which it was bound to take precautions. Lord Chancellor Hatherley said, on page 56:

> "To hold the railway company liable for an accident of that description would, I think, be extending the liability of the company for damages in consequence of supposed negligence in not taking precautions against every remote and contingent possibility of accident to an extent beyond anything that has been laid down in any case with which I am acquainted and which, indeed, common sense would not warrant."

In *Milwaukee, &c., Ry. Co.* v. *Kellogg*, 94 U. S., 475, it was said:

> "But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 152 Fed., 120, it is laid down by the Circuit Court of Appeals, 8th Circuit, that an injury which could not have been foreseen or reasonably anticipated as the natural and probable result of an act of negligence is not actionable because it is not the proximate cause, but either the remote cause or no cause whatever of the damage.

To the same effect is *Cole* v. *German Savings, &c., Society*, 124 Fed.,113.

In *Stefanowski* v. *Chain Belt Co.*, 109 N. W., 532,

the Supreme Court of Wisconsin, in a recent decision, after full examination of the question, said:

> "Whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action."

See, also, the well considered opinion of Judge Pollock in *Missouri Pacific Railway* v. *Columbia*, 65 Kan., 390, s. c., 69 Pac., 338. To the same effect, see, *Cleghorn, et al.*, v. *Thompson, et al.*, 62 Kan., 727; s. c., 64 Pac., 605.

1 Sutherland on Damages, 3rd Ed., Sec. 16.
1 Shear. & Red. on Negligence, 4th Ed., Sec. 28.

See, also, remarks of Judge Agnew in *Fleming* v. *Beck*, 48 Pa. St., 313.

Hoag v. *Railway Company*, 85 Pa. St., 293.

The above principle was applied in *Morrison* v. *Davis & Co.*, 20 Pa. St., 175, in which it appeared that on account of a negligent delay in the transportation of goods, they were subsequently overtaken and damaged by an act of God, and where it was said:

> "The general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast; and *not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature.*"

The ruling in that case was followed and applied in *Railroad Company* v. *Reeves,* 10 Wallace, 176, and is, therefore, the rule of the Federal courts.

See, also:

C. St. P. M. & O. Ry. v. *Elliott,* 55 Fed., 949-952.

Scheffer v. *Railroad Company,* 105 U. S., 249.

Glassey v. *Worcester Con. St. Ry. Co.,* 185 Mass., 315; s. c., 70 N. E., 199.

Stone v. *B. & A. R. R. Co.,* 171 Mass., 536; s. c., 51 N. E., 1.

It may be true that a person committing a misdemeanor or felony, and, therefore, wilfully and wrongfully engaged in the commission of an illegal act, or if engaged in the commission of a mischievous act, should be held for all the consequences, whether direct or remote, yet if the wrong complained of be merely an inadvertent or thoughtless omission of duty or a mere negligent act without any wilful intent to inflict injury, a different rule should and does prevail. A defendant in such cases should only be held responsible for those results which might reasonably have been foreseen by a man of ordinary intelligence and prudence. In such a case he could not be expected to anticipate that an extraordinary, unprecedented and unexpected calamity might intervene to cause a damage which was rendered possible merely by reason of a condition or situation brought about without design on his part to inflict injury.

While there is an admitted conflict in the decisions upon this question of proximate cause, yet the rulings of the Federal courts and the weight of authority are

to the effect that even an antecedent negligent delay in transportation cannot be regarded as the proximate cause of damage where it appears that a subsequent act of God such as an extraordinary flood, intervened and was the efficient and producing cause. It might as well be contended that if a man were walking along a street and was struck by lightning and killed that the cause of his death was his walking along the street.

In case of either a breach of contract or a failure to perform a duty, the party in the wrong can only be held for such results as might be expected to ordinarily flow from the breach or the failure. Any other result would not have been in the contemplation of the parties to the contract as likely to flow from the breach thereof, or in the other case as likely to flow from a failure to perform the duty in question.

It was, therefore, held in *Railroad Company* v. *Reeves*, 10 Wallace, 176, where it was shown or admitted that the shipment involved in that case was overtaken by an extraordinary and unprecedented flood, that an antecedent negligent delay which may have resulted in bringing the goods in proximity to the flood was the remote and not the proximate cause of the damage; also that even if there had been a special agreement to forward the goods, no recovery could be had for failure to comply with such agreement on account of damages caused by an extraordinary flood since the same could not have been reasonably anticipated as likely to flow from the breach.

The ruling in *Railroad Company* v. *Reeves, supra,* was approved in *St. Louis, &c., Ry.* v. *Commercial Ins. Co.*, 139 U. S., 237.

See, also:

Volume 7, Rose's Notes to U. S. Rep., Reeves Case, pp. 297-298.

Hutchinson on Carriers, 2nd Ed. by Meachem, Secs. 193-4-5.

Vol. 5, Amer. & Eng. Ency. of Law, 2nd Ed., pp. 259 and 260.

A similar ruling was made with reference to this very flood, concerning similar losses at Kansas City, by the Supreme Court of Kansas in *Rodgers* v. *Missouri Pacific Ry.*, 88 Pac., 885, and also by the Kansas City Court of Appeals in *Moffatt Commission Company* v. *Union Pacific R. R. Co.*, 88 S. W., 117; s. c., 113 Mo. App., 544. In each of these cases it was held that the flood in question was so extraordinary and unprecedented and sudden in its appearance that the railway companies could not be held negligent in not anticipating the same and in failing to remove freight either from their cars or depots at Kansas City.

It is recklessly stated in bold italics, page 127, opponent's brief:

> "In this case, as we have seen, the flood was no sudden affair, coming like a fire or cyclone, *but had been coming on for nearly a month before its climax was reached.*"

Yet the Kansas City Court of Appeals, sitting in that vicinity and passing upon a claim for damage caused by this very flood, said in *Lightfoot* v. *St. Louis & S. F. R. Co.*, 104 S. W., 483, decided October 7, 1907, as follows:

> "The facts before us are similar in essential particulars to those considered in the case of *Moffat Commission Co.* v. *Railroad*, 113 Mo. App.,

544; 88 S. W., 117, and for the reasons expressed in that case, and in the later cases of *Pinkerton* v. *Railroad,* 117 Mo. App., 288; 93 S. W., 849, and *Lamar Mfg. Co.* v. *Railroad,* 117 Mo. App., 453; 93 S. W., 851, we find no difficulty in reaching the conclusion that the negligence, if any, of defendant in delaying the car at Kansas City, was but a remote cause of the injury; *the direct cause being the flood which appeared so suddenly and with such magnitude and force that its advent could not be anticipated nor its consequences averted by the exercise of human care and foresight.* Plaintiffs vainly endeavored to establish negligence on the part of defendant which co-operated with this act of God by drawing from its officers, who testified as witnesses the admission that they knew from newspaper reports the watershed of the Missouri and Kansas rivers had been, and was, receiving extraordinary rainfall, that both rivers were greatly swollen, and that their waters were expected to continue to rise. But, to say from these facts (as we must to sustain the judgment) that defendant, in the exercise of care, should have anticipated the suddenness and magnitude of the flood which swept down the Kansas river, and in a few hours covered its wide valley with water over 10 feet in depth, would be to hold defendant to the exercise of a degree of care with respect to this car of eggs beyond that to be expected of the most careful and prudent persons. *It is a matter of common knowledge that the people whose homes were in the path of the flood and those engaged in the numerous activities located in that area were so completely surprised by the visitation that many lives were endangered and property of enormous value destroyed. The warning was so brief that very little property was removed to places of safety before the disaster befell.* The principles applicable to the present situation have been so fully discussed in the cases to which we have referred and in other recent

cases (*Grier* v. *Railway Co.*, 108 Mo. App., 565; 84 S. W., 158; *Rodgers* v. *Railroad* (Kan.), 88 Pac., 885; *Cattle Co.* v. *Railroad* (C. C.), 135 Fed., 135; Id., 147 Fed., 457, 77 C. C. A., 601) that we deem it unnecessary to give them an extended discussion here. There was no issue of fact to submit to the jury, and the learned trial judge erred in not sustaining the demurrer to the evidence."

Prior to the morning of May 31st there was nothing unprecedented about the flood in this river. Floods had occurred before and not endangered the Stock Yards. Until the very morning of the 31st it could not have been anticipated that these Stock Yards would be endangered. Thereafter the rise in the river became unprecedented, extraordinary, and was sudden, as stated by the Kansas City Court of Appeals, and as the evidence in this case plainly proved.

The rule in *Railroad Company* v. *Reves* is also amply supported by the following among other authorities:

Morrison v. *Davis*, 20 Pa. St., 171.

Denney v. *New York Central*, 13 Gray, 481.

Hoadley v. *Northern Transportation Co.*, 115 Mass., 304.

McClary v. *Sioux City R. R.*, 3 Neb., 44; s. c., 19 Amer. Rep., 631.

Mich. Cent. R. R. v. *Burrows*, 33 Mich., 6.

Daniels v. *Ballantine*, 23 Oh. St., 532.

Clark v. *Pacific R. R.*, 39 Mo., 184.

Herring v. *Chesapeake, &c., R. R.*, 101 Va., 778; s. c., 45 S. E., 322.

Gilson v. *Delaware, &c., Canal Co.*, 65 Vt., 213; s. c., 36 Am. St. Rep., 838-9, notes.

The Startle, 115 Fed., 560.
13 Am. & Eng. Ency. of Law, 2nd Ed., page 722.

A contrary view was adopted by the New York court at an early day, which was followed by a few other courts, notably the Supreme Court of Minnesota in *Bibb Broom Corn Co.* v. *The A. T. & S. F. Ry. Co.*, 102 N. W., 709 (cited by our opponents). In the latter case the court admitted that its decision was contrary to the Federal authorities, and it refused to follow the same.

None of the acts of defendant concurred with the act of God to cause the loss in question. They all preceded the inundation of the Stock Yards and had spent their force. It was the unprecedented and unexpected inundation of the Stock Yards, caused by this unprecedented flood, that was the direct cause of the damage complained of, because it was that inundation alone which prevented the feeding and watering of the cattle upon the viaducts.

Thus in *Herr et ux* v. *City of Lebanon*, 24 Atl., 207; s. c., 149 Pa. St., 222, it was said:

> "If two distinct causes are operating at the same time to produce a given result, which *might be produced* by either, they are 'concurrent' causes. They run together, as the word signifies, to the same end. But if two distinct causes are successive and unrelated in their operation, they cannot be concurring. One of them must then be the proximate, and the other the remote, cause. When they stand in this relation to each other and the result to be considered the law regards the proximate as the efficient and responsible cause, and disregards the remote."

Also in *Baltimore, &c., R. R. Co.* v. *School District*, 96 Pa. St., 65; s. c., 42 Am. Rep., 529, it was stated:

> "We apprehend that the concurring negligence which when combined with the act of God, produces the injury, must be such as is in itself a real, producing cause of the injury, and not merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury."

Helbling v. *Cemetery Company*, 201 Pa. St., 171; s. c., 50 Atl., 970 (cited by our opponents) simply arose upon certain instructions of the court. The negligence alleged was such as might be well held to have concurred with the rainstorm in question in producing the damage. The opening of a sewer was on defendant's land from which it received surface drainage. It was surrounded by grating or crib to prevent it from becoming clogged with rubbish. The negligence alleged was that defendant allowed large quantities of brush, leaves, and cutgrass to lie along the watercourse and near to the opening of the sewer, and that these were carried by the rains to the crib and so clogged it that water did not have a free passage but was flowed back, injuring plaintiff's house. The negligence complained of still existed as an operating or producing cause and directly concurred in causing the damage. The case of *B. & O. R. R.* v. *School District*, *supra*, is quoted with approval. The storms were not unprecedented. The trial court instructed the jury that the defendant could be held liable only in case some negligent act on its part, "the natural consequences of which *should have been foreseen*, concurred with the flood in producing the loss."

It was distinctly held, however, that defendant was not liable if the extraordinary rainfall would have caused the injury notwithstanding any negligence on the part of defendant.

VII.

AS IT MUST BE ADMITTED THAT THIS FLOOD WAS AN ACT OF GOD WHICH INTERVENED TO CAUSE THE DAMAGE AND FOR THE CONSEQUENCES OF WHICH DEFENDANT COULD NOT BE HELD LIABLE, THE BURDEN WAS UPON AND WAS ASSUMED BY PLAINTIFFS, THEREFORE, TO ALLEGE AND PROVE THAT DEFENDANT WAS GUILTY OF NEGLIGENCE, WHICH PROXIMATELY CONTRIBUTED TO CAUSE THE LOSS, AS IN SOME FAILURE TO USE REASONABLE EFFORTS UNDER THE CIRCUMSTANCES TO PROTECT THE SHIPMENT IF POSSIBLE AFTER IT WAS OVERTAKEN IN THE STOCK YARDS BY THE FLOOD. BUT THE FORESIGHT REQUIRED TO BE EXERCISED BY DEFENDANT TO ANTICIPATE THE PERIL IS SUCH AS CAN BE JUDGED ONLY BY WHAT WAS GENERALLY KNOWN PRIOR TO THE DISASTER AND NOT BY WHAT THE DISASTER AND SUBSEQUENT KNOWLEDGE OR INFORMATION DISCLOSED.

In other words, when overtaken by such an extraordinary disaster as the one in question, the carrier is placed in the position of a bailee or agent for the owner or shipper and is required only to use reasonable care to protect the shipment against further damage or peril.

It was settled in the case of *Railroad Company* v. *Reeves*, 10 Wallace, 176, 189 and 190, that when the carrier shows that a shipment was damaged or de-

stroyed by an act of God, the burden of proof is then upon the plaintiff to show affirmatively that defendant was guilty of ordinary negligence which directly or proximately contributed to cause the damage complained of, and *that the carrier in case of such disaster was only required to use ordinary diligence to avoid or remedy the effects of the overpowering cause.*

This rule was applied under other circumstances in *Cau* v. *Texas and Pacific Railway Company,* 194 U. S., 427. Also in *Charnock* v. *Texas & Pacific Railway Company,* 194 U. S., 432.

See also *Washburn-Crosby Co.* v. *William Johnston Co., Limited,* 125 Fed., 273.

There can be no hardship in such a rule in the present case inasmuch as some of the plaintiffs, as well as their agents, accompanied the shipment and were in charge thereof, as the contract provided.

See 4 Elliott on Railroads, p. 2348, Sec. 1516, Note 3.

It is claimed that defendant, when it started with the shipment to Kansas City, should have known that this flood would be of such an extraordinary and unprecedented character *as to endanger the Kansas City Stock Yards,* where the stock were to be delivered for the connecting carrier, and also that after the shipment arrived at the Stock Yards at Kansas City and was assumed by defendant to have been delivered to the connecting carrier in accordance with the well established custom, yet defendant should still have anticipated the extraordinary and unprecedented character of the flood at that point and that the same was

likely to inundate the Stock Yards for six or seven days, and should, therefore, have driven the cattle out of the yards and not upon the viaducts. It is even claimed that the act of God was not the sole cause of the disaster and that the act of man contributed, as the damage was caused by inability to sufficiently feed the cattle upon the viaducts. In other words, it would seem to be contended that if defendant had left the cattle in the yards to be drowned, the act of God would have been the sole cause and there would have been no liability, but as the agents of the Stock Yards Company drove the cattle upon the viaducts to a place of apparent safety, *such act* resulted in the inability and consequent failure to feed the cattle and that, therefore, the act of God was but the remote cause of the damage. Plaintiffs forget that it was stated in their petition that by reason of the unprecedented character of the flood the cattle could not be reached and properly fed.

It is also claimed that General Superintendent Hurley and Superintendent Sharpe were devoting their attention to cars at Argentine and apparently neglecting this shipment. This is but a sample of our opponent's arguments. It might as well be contended that the president of the road was not giving his particular attention to this particular shipment. They seem to believe that this was the only shipment upon the entire railroad which required any attention. It seems to be forgotten that the agents of the railway company had to look after other shipments in more dangerous positions or places than this one. It seems also to be forgotten that the cattle were in the custody

of the Stock Yards Company and its agents were using all the diligence which anybody could be expected to use under the conditions then known.

The very fact that this flood was of an unprecedented and unexpected character in that locality is sufficient to show that defendant's agents could not be held to anticipate that it would endanger the Stock Yards inasmuch as other floods, within the experience of living witnesses in that locality, had not inundated or endangered the Stock Yards where the cattle were placed.

Plaintiffs' contention, in respect to each of the charges of negligence, when reduced to the last analysis, is necessarily that defendant's agents were negligent because not gifted with prophetic vision sufficient to know beforehand, and therefore, to anticipate, that the flood at Kansas City which finally overtook the shipment in the Stock Yards would be of such an unprecedented and unexpected character and last as long in its effects as subsequent experience proved to be the case. But the care required of defendant's agents under the circumstances is not to be judged by what was ascertained after the calamity occurred.

The court admitted a great deal of evidence which had no relevant bearing upon that question. It was not important at all to show the extent of rains several hundred miles away at the different sources of the river, and in quite a different territory, and the effect of which could only be definitely ascertained by some expert making a careful calculation after being possessed of data of which the average individual could have little or no information. The sole ques-

tion was whether at Kansas City, where the damage was done, a flood of this unprecedented character and dimensions should have been anticipated so that the defendant ought to have known that it would be dangerous at the time to transport the shipment *to the Kansas City Stock Yards* and to leave it there temporarily, to be taken farther by the connecting carrier. The fact that other portions of the railroad may have been under water was not material, for, as is well known, the grade of a railroad is not exactly level. Neither did the height of the waters at Topeka warrant the people at Kansas City, if they had known of the same in time, in believing that the flood would rise higher there over the banks of the stream than it had on other known occasions.

Railroad agents are but human and are gifted with no greater power of prophecy or foresight than ordinary individuals. One is not obliged to always take a pessimistic view and regard every approaching flood as another "Noah's Deluge."

Neither was it at all important that it was shown that a single individual drove his mules from his yards or stables a block distant from the stock yards out of the city. He had no viaducts above his yards upon which the mules could be driven. Similar evidence, however, was held irrelevant, immaterial and of no force in *Grier et al.* v. *St. Louis Merchants' Bridge Terminal Ry. Co.*, 84 S. W., 158; s. c., 108 Mo. App., 565.

Such an isolated instance was not pertinent to show that the agents of the Stock Yards Company were negligent in not driving the cattle out of the stock yards.

The evidence plainly showed the impracticability, if not the impossibility, of driving so many wild Texas cattle through the streets of Kansas City, as would be necessary if they were to be taken out of the stock yards. There was no place near by to which they could have been driven and cared for. But in driving them upon the high viaducts, where they would be out of the water and in order to prevent their drowning, the Stock Yards Company showed reasonable diligence, because *they had a right to assume that the flood would not reach the extraordinary proportions it did, or that it would subside as rapidly as it had approached. The viaducts seemed to be then as safe a place as anywhere for the cattle, and if the flood had receded as rapidly as it had approached, the cattle would not have been damaged as they could have been fed and watered in time.*

It is again asserted by our opponents that there was not a single head of cattle in any of the packing houses when the flood reached its climax and only a comparatively small number of cattle, in addition to the large bunches of plaintiffs', were in the stock yards. The inference they would have the court to draw from that statement is that other cattle had been removed on account of the approaching rise or flood, but no witness testified that any stock or meat or anything else was removed from any of the packing houses. The testimony was that there was great loss of property in these packing houses. No witness testified that there was not a single head of cattle in any of the packing houses. The reason there were not as many cattle in the stock yards at that time was fully explained by the

testimony. Witnesses stated that the run of cattle was lighter towards the end of the week, and on this occasion, Saturday, May 30th, was a holiday and, therefore, there was no market, and shippers of cattle did not want to hold cattle in the yards, which was also a general market place, over Saturday and Sunday. But Mr. Allen, a witness for the plaintiffs, testified that 1800 head of sheep and several thousand hogs were in the stock yards when the flood came (Rec., 258) and they were all or nearly all drowned. Other witnesses testified that the river was full of carcasses of animals.

The case of *Grier* v. *St. Louis Merchants' Bridge Term'l Ry. Co.*, 84 S. W., 158; s. c., 108 Mo. App., 565 (St. Louis Court of Appeals, 1904), arose out of the St. Louis flood in the same year, and the court says on page 161:

> "*It is easy to pick flaws in the conduct of persons in times of danger and excitement, and say, if this or that had been done, the result would have been different.* The appellant's servants might have moved this car of oats on Friday night or Saturday morning to where it would not have been injured, if they had known it was in danger. It would be granting a great deal to say they could have moved it at all, considering that the tracks over the bridge were filled with trains having precedence over freight trains. But looking at the situation, with its many difficulties and serious responsibilities, calling for instant attention, we think the facts of this case make a much stronger showing of loss of property by a natural disaster, unmixed with negligence on the part of the custodian of the property, than did the facts of *Am. Brewing Ass'n* v. *Talbot*, 140 Mo., 674, 42 S. W., 679, 64 Amer. St. Rep., 538, in which the defendants were exonerated from blame."

NECESSARY FORESIGHT NOT TO BE JUDGED BY HINDSIGHT.

The evidence plainly showed that even the Government officials at Kansas City did not, prior to, but only after, May 31st, have information of the last rise in the river at Topeka, and issued no warnings either to defendant or to the public generally that the flood at Kansas City would be unprecedented, as indeed such officials did not know of the rise at Topeka until after the flood had reached its height and was subsiding. It is easy to confound subsequent knowledge acquired by the happening of an event with that which was only apparent prior to the occurrence. It would not be fair to measure a man's foresight by his hindsight. The authorities fully sustain this rule in cases like the one at bar.

In *Nashville & Chattanooga R. R. Co. v. David*, 6 Heisk., 261; s. c., 19 Amer. Rept., page 594, which was cited by our opponents, it was said:

> "How could the plaintiff in error be reasonably required to use all means to obtain information of an event about approaching in the shape of a freshet, that all past experience in like matters had furnished no previous example, nor any reason on which the use of such means should be demanded? In other words, how could the company be held responsible for not anticipating and preparing for that, which human sagacity, surrounded by the precise state of facts, and with a knowledge of the past history of rises in the river, which surrounded the party here, and with the facts known to defendant's employes, could not have anticipated, unless we require in such case a prescience, such as no human being can either claim or be responsible for not exercising?"

In *American Express Company* v. *Smith,* 33 Oh. St., 511; s. c., 31 Amer. Rep., 561, it was said with reference to a similar case:

> "There is an *ex post facto* wisdom, which, after everything has been done, without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best lights afforded."

So also in *Libby* v. *Main, etc., Ry. Co.,* 20 L. R. A., 812, the Supreme Court of Maine said:

> "The test of liability is not whether the company used such particular foresight as is evident *after the accident happened* might have averted it had the danger been known, but whether it used that degree of care and prudence which a very cautious and prudent person would have used under *apparent* circumstances of the case to prevent the accident without reasonable knowledge that it was likely to occur."

So also in the old case, which was cited by our opponents, *Wallace* v. *Clayton,* 42 Ga., 443, and which was based upon a provision of the Georgia code which required common carriers to "use extraordinary judgment" it was nevertheless said:

> "*There was not a moment after the flood got beyond the highest ever known before when they did not have the right to suppose that the limit of the overflow would soon be reached, and the higher it rose the more unnatural it became, the more contrary to human experience the more baffling to the prudence of the prudent.* If we add to this that on the 8th they had a telegram from Knoxville that the river was falling, it is not

at all strange they should feel quite sure they were safe at their own depot."

In that case the court held that defendant had exercised all the care required by the Georgia code.

In *American, etc., Assn.* v. *Talbot,* 141 Mo., 674; s. c., 42 S. W., 679, the court, on page 683, said:

"No such high stage of water had ever been known in that locality, consequently, no bad results therefrom to admonish defendants of approaching danger by reason thereof. Then how could the defendants be held responsible for not anticipating and preparing for that which human sagacity could not have anticipated, unless we require, under such circumstances a prescience, such as no human being can either claim or be held responsible for not exercising?

"Numerous authorities hold that it is not negligence not to take precautionary measures to prevent an injury, which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened.

"Ray, in his work on Negligence of Imposed Duties, pages 133, 134, says: 'Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure *of what appears likely in the usual course of things.* The proper inquiry is not whether the ac-

> cident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, *after the accident*, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. * * * The prudence and propriety of men's doings *are not judged by the event*, but by the circumstances under which they act. If they act with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen, nor reasonably anticipated, had disappointed their expectations."

Quotation is then made by the court, with approval, from Webb's Pollock on Torts (Enlarged American Edition), pages 45 and 46, which has been heretofore quoted by us.

In *Norris* v. *Savannah, etc. R. R. Co.*, 11 Am. St. Rep., 355, 23 Florida, 182, there appeared to have been a loss of perishable freight which had been delayed by reason of delay occasioned by the flood of 1884 in the Ohio river, which flood was unprecedented, though it had been preceded by floods nearly as great. The court, however, said:

> "We do not think the rises of the Ohio river in 1882 and 1883 deprive the rise of 1884 of its character as an act of God, or required the appellee to have reconstructed its road, or provided other means of transportation across the river to meet such emergency. The testimony shows that, up to the time the witnesses in the case testified, these rises were wholly unprecedented."

In the case of *Smith* v. *Western Ry.*, 91 Ala., 455; s. c., 8 So., 754 (a dictum from which was quoted by our opponents in their brief) the court held that, under the undisputed facts the defendant was entitled to a general charge in its favor, and it also said with reference to the flood involved in that case:

> "No human power could have stayed the flood, or foresight or prudence have anticipated such an overflow. It is contended that, if the train had remained in LaGrange, Georgia, or the car had been run out on the main track, the goods would have escaped injury. It is no proof of negligence that because after an injury has resulted it can then be seen how the injury might have been aovided. The question is, what *notice or knowledge* had the defendant from which such an overflow could reasonably have been anticipated or foreseen? In this case the proof shows none. Was there any fault or negligence on the part of the defendant for not removing the goods to a safe place, after it became reasonably known that the high water would reach the goods where stored in the cars? On Monday night the goods were left in the cars, to all human knowledge in a place of safety. On Tuesday morning the water had overflowed the entire railroad track. It seems that the engineer and crew used all reasonable diligence consistent with personal safety, after daylight and information of the overflow, to procure a batteau, in order to reach the car where the goods were stored. The engineer testifies he tried to get up steam, but the water had entered the fire box of the engine. That then all was done that could be done to save the goods, but without avail, the water continuing to rise in the cars to a depth of eighteen inches above the floor. * * * Whether the court below erred in the admission or exclusion of testimony offered, or in the charges given or refused, the undisputed facts show that the defendant was entitled to a general verdict in its favor."

In *Long* v. *Pennsylvania R. R. Co.*, 147 Pa. St., 343; s. c. 23 Atl., 459, it appeared that the damage complained of was caused by the Johnstown flood, and it was said:

> "It may be possible for us, looking back coolly in the clear light of history on that terrible catastrophe, to see how property and life might have been saved if men on the ground had realized the awful magnitude of the impending calamity. It was not realized. The inhabitants of the populous valley sat in their homes, or went about their business, while the deluge was approaching."

So, in *Gulf, etc., R. R.* v. *Compton*, 38 S. W., 220 (Texas), where the damage arose out of a severe windstorm, it was said:

> "A carrier is not liable for an injury caused by an act of God, where the attending circumstances show no concurring negligence of the defendant. This rule is too well settled to need citations. It is not demanded of any person that he expect and take precaution against unprecedented and unforeseen natural events. The testimony is that no similar storm had ever occurred *in that locality*, and, if there is any want of care, or of the utmost care, on the part of the defendant in the handling of this wagon, we fail entirely to detect it."

In *International, etc., Railroad Co.* v. *Bergman*, 64 S. W. 999 (Texas), which arose out of the Galveston flood, it was decided that, in order to charge a common carrier with goods lost in an unprecedented storm, the plaintiff must show that by ordinary prudence it could have protected the goods *after becoming aware of the impending danger*. In the opinion it was said:

> "The storm in question was of such unprecedented fury, resulted in the destruction of such a vast amount of property, and in such an appalling

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loss of human life, that it attracted the attention of the entire civilized world. The court may therefore assume judicial knowledge of the fact that it occurred, as well as its nature and extent. This being true, we may safely proceed upon the assumption that when the people of Galveston awoke to a realization of their danger they gave small thought to the danger threatening senseless chattels, and turned their attention to saving their own and other human lives. In such a situation it will be scarcely contended but that the most prudent man would have busied himself in looking to the welfare of his family and friends, and in deference to such a paramount duty he would have postponed the safety of his most precious chattels. The defendant, though a corporation, must have exercised the care demanded through human agencies. Its officers, clerks, and draymen were human beings, and all alike subject to the impending calamity."

See also *Norfolk, etc., R. R. Co.* v. *Marshall's Admr.*, 90 Va. 836; s. c., 20 S. E., 823.

In taking the stock, therefore, to Kansas City for delivery to a connecting line at the stock yards, defendant, under the circumstances then known, was using due diligence and the best judgment which could be expected. Frost, one of the shippers who accompanied the shipment, was chafing at Strong City at the delay there, and wished to have the cattle sent around the flooded district on the Burlington road. It was desirable to have the cattle forwarded to destination by any available route or line which appeared at the time to be reasonably safe. This was a character of freight which could not be held long in transit without being somewhat damaged. Frost, who made the contracts of shipment in the one case and accompanied the

same, and the agents of the other shippers in the other case, were evidently aware of all that was being done and made no objection to the course pursued.

Plaintiff's Authorities Not in Point.

In examining the various authorities cited it must be remembered that many courts hold that any action of the elements is an act of God, or what is sometimes called *vis major*, such as the effect of freezing, ordinary storms, etc. In such cases it is, of course, held that carriers should anticipate that such things are likely to occur at certain seasons of the year, as experience shows are probable. In the fall and winter the carrier should use reasonable diligence to protect certain perishable freight from the effects of cold weather. Upon the ocean storms are to be anticipated and the vessel should be seaworthy because such storms are likely to occur at such places. So the carrier should not put out in a storm in a small boat or a frail vessel. In such cases damage is likely to occur and should be anticipated as likely to happen from the ordinary or usual action of the elements. A carrier should not be expected, however, to anticipate a severe frost in midsummer in one of the southern states.

Other authorities define an act of God which will excuse the carrier as an unprecedented and unforeseen casualty and one which could not have been anticipated in the ordinary course of events. In such cases the carrier would only be guilty of negligence in failing to take care of the goods after they were overtaken by the casualty and its extent became apparent.

That is the extent of the rule laid down in Hutchinson on Carriers, 2d Edition by Meacham, Sec. 201.

In *Williams* v. *Grant*, 1 Conn., 487 (cited by our opponents), while the cause of the loss was the striking of the vessel upon a rock not generally known, yet it appeared from the evidence that the master was ignorant of navigation; that he had gone out of the usual course for vessels to take and had taken an unknown course; that he had no pilot, as was customary; that the danger was not wholly unknown, but evidently would have been known to an experienced pilot.

In *Richmond & D. R. R.* v. *White*, 88 Ga., 805 (cited at length by our opponents), the liability was founded upon a provision of the Georgia code, set out on page 100 of opponents' brief, requiring a common carrier "to use *extraordinary judgment.*" While the goods in question were damaged by a flood, yet it appears from the quotation on page 104 of opponents' brief that there had been a higher one previous thereto so that the flood there involved was not unprecedented, but might have been anticipated.

So in *Steamboat Company* v. *Tiers*, 24 N. J. L., 697 (cited by our opponents), it appeared that a severe storm caused a low tide so that the carrier's barge struck against a timber projecting from the bulkhead of the wharf, which, piercing the vessel, permitted the water to flow in and damage the goods. The ruling of the court was based upon the proposition that it was the duty of the carrier to provide good and sufficient docks, boats and other implements necessary and proper for its business, and that they must be free from defects, seen or unseen. In other words, the bulkhead

was found to be defective and that was held to be an instrumentality of the carrier. It also appeared that the master had been advised that it was dangerous to tie up at that dock; that the agent neglected to remove the boat and place her in a more secure position, although advised to do so, being warned of her danger.

In *Southern Pacific Co.* v. *Schoer,* 52 C. C. A., 269 (cited by our opponents), there was a collision during a fog between two trains which caused the disaster. It was said that there was nothing in the darkness of the night or foggy air which would have prevented the railway company from safely operating its trains if it had exercised the care, watchfulness and diligence proportionate to the circumstances in which it was placed. In other words, with the knowledge of the darkness and fog and its attendant danger, the carrier did not use the precautions which should have been taken under the circumstances then known to exist.

In *Davis* v. *Railroad Company,* 66 Vt., 297; s. c., 29 Atl., 313 (which was also cited by our opponents), the distinction which we insist upon is clearly pointed out. In that case the loss was caused by fire, for which the carrier under its bill of lading was exempt from liability. Though there was an alleged negligent prior delay in removing the grain, the court held that the fire was the proximate cause of the loss. In that case it was clearly pointed out that the carrier is only required to protect the property from dangers which are *known to exist,* and in conclusion it was said:

> "In the case at bar, if the defendant could have protected the property from the fire, *after it knew the fire existed,* by the exercise of reasonable prudence and diligence, and did not, the defendant

would have been liable, from its failure to use this measure of prudence and diligence, but not on the ground of its delay to move the grain earlier."

It was also said:

"We think it is the better conclusion that in such cases, if the proximate cause of the loss arises in such a manner that it will not support an action, neither will the remote cause, though incidental to the proximate cause. If the proximate cause occurs without the fault of the carrier,—in other words, as to him, is accidental,—he cannot forecast when or where it may fall upon the goods intrusted to him to carry, or whether it will fall upon them at all. It is as likely to fall upon them when being moved with despatch as when delay occurs. Being unconnected with it, he cannot forefend the property intrusted to him against it by the exercise of the utmost prudence and diligence. If he could forecast when or where it would occur at times, it might, be his duty to delay the movement of the property. In that way only could he protect the goods. *But inasmuch as he cannot forecast that it will occur, nor when nor where it will occur, and is himself in no respect responsible for its occurrence, he is under no duty to the consignor or owner of the goods in regard to its occurrence.*"

The case of *Michaels* v. *R. R. Co.*, 30 N. Y., 564 (cited by our opponents), which laid down a rule contrary to that adopted by the federal courts, was also cited to this court in the argument in the case of *R. R. Co.* v. *Reeves*, 10 Wallace, 176, but this court declined to follow the same.

In *Nelson* v. *Railway Co.*, 72 Pacific, 643 (cited by our opponents), it was simply held that a common carrier *receiving* property for transportation *with knowledge of the existence of an obstruction on its route*,

and without informing the shipper, could not offer the obstruction as an excuse for subsequent delay caused by such obstruction—a snow blockade.

In *McGraw* v. *R. R. Co.*, 18 W. Va., 361 (cited by our opponents), the goods were frozen, but this damage occurred at a time when the defendant should have anticipated such an occurrence, as it was not unusual, and should have protected the property against the same.

In *Strouss* v. *Ry. Co.*, 17 Fed., 209 (cited by our opponents), the court instructed the jury that they could not expect the railway company to make any extraordinary provisions such as were only required on extraordinary occasions.

In the case of *Gleeson* v. *Railroad Company*, 140 U. S., 435 (cited by opponents), the facts of which are not applicable at all to the case at bar, as the disaster was caused by the effects of an ordinary storm, causing a sliding of earth upon the railroad track, the court used the following language:

> "We know of no instance in which a rain of *not unusual violence*, and the probable results thereof, in softening the superficial earth, have been so considered"—(as an act of God).

Referring to a Minnesota case, the court continued:

> "It was held that a man is negligent if he fail *to take precautions against such rises of high waters as are usual and ordinary and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case.*"

In the Gleeson case it should also be noticed that there was negligence in the construction of the track

and also in failing to take proper precautions after the rain to see that the track was safe for the passage of trains.

In the case of *The Majestic,* 166 U. S., 376 (cited by opponents), baggage was flooded with water which came through a broken port hole of the steamer, and which the evidence showed was not securely covered and had not even been examined. As the carrier knew that a storm upon the sea, which was likely to occur at any time, would cause the water to flow through such defective port hole, it was held that the carrier should have taken care to see that the vessel was seaworthy in that respect.

Extracts from opinions should be read in the light of the facts involved, and the garbled extracts made by our opponents are from cases wholly inapplicable to the case at bar. Some of these cases, moreover, lay down rules contrary to those laid down by the federal courts upon the different questions involved.

Under the "sixth" paragraph of the written contracts for carriage the shipper, moreover, expressly assumed all risk of injury by reason of delay in transportation or of injury to tracks or yards, or by storms, washouts, etc.

VIII.

WITH DELIVERY OF THE CATTLE TO THE KANSAS CITY UNION STOCK YARDS FOR THE CONNECTING CARRIER, THE MISSOURI PACIFIC RAILWAY, IN ACCORDANCE WITH THE CUSTOM OR PRACTICE OBTAINING, DEFENDANT'S RESPONSIBILITY CONCERNING SAME CEASED.

The evidence showed that arrangements had been made with the Missouri Pacific Railway Company to receive the cattle at Kansas City. The usual place of delivery in case they were to be forwarded from that point was the Union Stock Yards. It further appeared that an engine of the Missouri Pacific Company had switched a number of these cars to the Missouri Pacific chutes and cattle had been unloaded therein. The evidence plainly showed that according to the custom and practice prevailing at that point the cattle were no longer under the control of the defendant as delivering company, but were only subject to the orders of the shipper or the receiving company, the connecting carrier. Arrangements had been made with a connecting carrier to receive the shipments at that place and it had been duly notified of the arrival of the different shipments before the approach of the final flood which overwhelmed the stock yards. Defendant had the right to assume, therefore, that the cattle were in the custody of the Stock Yards Company as the agent of the connecting carrier, the Missouri Pacific Railway Company.

It is contended (page 49 of opponents' brief), that as showing that the cattle were still in the custody of

defendants, it accepted a bond from plaintiffs after the flood in which it was recited that bills and charges for yardage, feed and pasturage were claimed by the railway company or *Kansas City Stock Yards Company,* which bills were denied by the Empire State Cattle Company and that as defendant was about to forward the remainder of the cattle without requiring payment of such bills and charges for feed, yardage and pasturage upon the giving of a bond, conditioned for the payment of said charges, if it should ultimately be determined that a liability or lien existed therefor, and in which the Empire State Cattle Company undertook to pay all proper expenses of feed and pasture bills which should be ultimately charged against the owners of the cattle or be a lien therefor, whether in favor of the railway company or of anyone to whose rights the railway company had succeeded. But it was also provided:

> *"It is expressly understood, however, that neither said Empire State Cattle Company or said The Atchison, Topeka and Santa Fe Railway Company, by giving and taking of this bond waive any of their respective rights under the contract of shipment of said cattle, and all of such rights on the part of the above parties shall be and remain as they may have been finally determined and agreed upon or finally adjudged by the courts."* (Rec., 128, 129.)

By the very terms of the agreement the bond was not to be taken or considered as prejudicing the rights or claims of any of the parties, and it is apparent that it was given as the result of some compromise under which the cattle were to be taken to pastures for feeding before they should be subsequently transported to

final destination. Neither does the fact that the old waybills were used by the railway company and endorsed "reloaded July 10, 1903, Lang, Kansas," tend to show that the cattle had not been delivered to The Missouri Pacific Railway Company at the Kansas City Stock Yards. The old waybills were used in pursuance of the compromise agreement for pasturing the cattle and in order to enable the plaintiffs to have the benefit of the original through rate inasmuch as The Missouri Pacific Railway Company, after agreeing to receive the cattle at Kansas City, had, after delivery to the Union Stock Yards for it, repudiated its undertaking. The defendant had the right to earn freight by having the original contract carried out by having the shipment transported to original destination.

A garbled extract from the testimony of Mr. Lathrop is set out on page 50 of opponents' brief. From the record, page 423, it seems that after the disaster there were negotiations between the railway company and the Empire State Cattle Company as to what should be done about the cattle and he appeared in the capacity of attorney for the railway company, but not as an agent who had any connection with the shipment or delivery of the cattle. He was not present during all these negotiations but stated that his understanding of them was that the cattle were to be taken to Emporia for pasturing *"under some agreement which would not alter or prejudice the rights of the parties as they stood at and prior to the time of the flood."* Immediately following the quotation made by our opponents he stated "and I do know that either at that interview or following, Mr. Combs made some arrange-

ment with your people. *My impression is that that arrangement was made after I left under which the cattle were to be shipped out without affecting the rights of either party.*" Furthermore, it appears that that deposition containing Mr. Lathrop's testimony was ruled out by the court (Rec., 415) and such ruling was assigned as error, but not according to the rules, in the Circuit Court of Appeals (Rec., 657), and was abandoned subsequently in both the brief and argument filed in that court and is abandoned in both the brief and argument filed in this court, and is, therefore, not a matter for consideration. The rules of the Circuit Court of Appeals, as well as of this court, require all assignments of error in the rejection or admission of evidence to set out the full substance of the same and such alleged error must be specified and set up in the briefs filed.

Under the terms of the written contracts of shipment which were made for and inured to the benefit of each connecting carrier receiving the shipment, the defendant was simply required to transport the cattle over its line and deliver or tender such shipment to a connecting carrier to be forwarded to the place of destination, and the carrier was not to be held liable after tender of the shipment in case such connecting carrier should refuse to receive the same.

According to the usage and custom prevailing at the Kansas City Stock Yards governing the delivery of cattle there for connecting lines, there was a delivery to The Missouri Pacific Railway Company and defendant had a right to assume that fact. (See Transcript of Record, pp. 532, 533, 541, 542, 543, 545, 547, 548, 549, 550, 551, 251, 252 and 464.)

The Kansas City Stock Yards were and are the delivering and receiving yards for cattle for a number of railroads connecting at Kansas City. A delivery of the cattle into these yards with notice to the connecting carrier which was to receive and further transport the same constituted a delivery to such connecting carrier. Indeed notice is not always required where under some custom or practice such stock yards or depot are treated as a common yard for delivery and receipt of shipments by connecting carriers.

See:

Converse v. *Norwich & N. Y. Transp. Co.* 33 Conn., 167, 181-182.

Merriam v. *Hartford & N. H. R. R.*, 20 Conn., 354, 360 and 361.

Whitworth et al. v. *Erie R. R.*, 87 N. Y., 414, last paragraph of syllabus and pages 420 and 421.

Washburn-Crosby, etc., Co. v. *Rld. Co.*, 180 Mass., 252; s. c., 62 N. E., 590.

Such is the rule established by this court.

See:

Pratt v. *Rld. Co.*, 95 U. S., 43.

Hostetter v. *Park*, 137 U. S., 40.

Also

4 Elliott on Railroads, Section 1412.

But under the "*Fifth*" paragraph of the written contracts the shippers undertook to look after and attend to the stock while in the stock yards or *at feeding* and *transfer points*. Plaintiffs' agents accom-

panied the shipments. They knew of the delivery of the cattle at the Union Stock Yards. The cattle were subject to their orders or those of the connecting carrier, The Missouri Pacific Railway Company, alone. By the contracts of carriage the defendant was released from the duty of looking after or attending to the cattle while in the stock yards or at feeding or transfer points. If anyone was negligent then after delivery of the cattle at the Union Stock Yards it was the shipper or the agents of the shipper in charge.

In any event, however, it is quite apparent that the agents of the Stock Yards Company, in whose custody the cattle were, did all that could be reasonably expected of them under the conditions then known to exist.

IX.

THERE WAS NO EXPRESS AGREEMENT TO TRANSPORT THE CATTLE BY WAY OF ATCHISON. NEITHER WERE THERE ANY INSTRUCTIONS FROM THE SHIPPERS TO TRANSPORT THE CATTLE OVER THE DEFENDANT'S LINE TO OR BY WAY OF ATCHISON. DEFENDANT, THEREFORE, NEITHER DEVIATED FROM ANY OF THE TERMS OF ITS AGREEMENT NOR FROM ANY INSTRUCTIONS OF THE SHIPPERS.

The claim now made of an alleged wrongful deviation from the route (alleged to be specified in the agreement of shipment but not therein contained) is evidently an after thought of the astute lawyers for the plaintiffs in order to fasten upon defendant a liability for damages which no one anticipated were likely to occur by taking the catle to Kansas City for

delivery to an available connecting carrier. At no time prior to or immediately after the damage did the shipper make any complaint on account of the stock going to Kansas City or feel aggrieved on account thereof. As the stock had been already detained at Strong City for several days owing to the bad condition of the railroad of the Burlington Company, which was unable to receive them at Atchison, the agents of plaintiffs in charge of the stock, as well as the agents of the defendant, were anxious to have them forwarded to destination as soon as possible by any reasonably available route or line.

There was no specific agreement between the parties to transport the cattle by way of Atchison rather than by way of Kansas City, and as the evidence showed no specific request by the shippers to have the cattle go that particular way it is difficult to understand how they can claim to be aggrieved by the exercise of a right which the defendant evidently had under the written contract to transport over any of its own available lines and deliver to a connecting carrier in the route to destination.

The three contracts in the case of the Empire State Cattle Company, which the pleadings admit to have been duly executed are between W. H. Frost and the Pecos and Northern Texas Railway Company acting for "itself and connecting carriers" which should receive the shipment. These contracts acknowledged receipt of the cattle at Hereford, in one case consigned to P. H. Kellogg at Evarts, S. D., in another to C. L. Millet at Evarts, S. D., and in another to Empire State Cattle Company at Evarts, S. D.

The initial line, the Pecos and Northern Texas Railway Company, which is one of the companies of the Atchison System, and which had authority to issue passes in favor of the parties who should go in charge of the shipments over the lines specified on the back of the stock contract, being the lines in that system, undertook to carry over its own line of railroad and deliver or tender the shipment to the connecting carrier to be forwarded to the place of destination, and each connecting carrier was to carry over its line and deliver to another connecting carrier, and the last one to the consignee at destination. Under the "*Tenth*" paragraph of these contracts, the provisions thereof inure separately in favor of each of the several connecting carriers to the point of destination, and no other contract is required to be executed by any connecting carrier receiving the shipment.

No route will be found designated in any part of the body of this contract, and therefore, there was no stipulation in the agreement which was signed by both parties which bound the carriers to transport by any particular or designated line or route. The notation or endorsement made on the backs of some of the contracts "Hereford, Texas, to Atchison, Kansas," was evidently placed thereon by the agent of the railway company solely in its own behalf and merely for the convenience of the carriers. It constitutes no part of the agreement. On other contracts the endorsement is "Kenna, New Mexico, to Evarts, S. D.," etc. It was merely in the nature of a filing notation made by some clerk of the railway company. These notations did not appear to have been put on at the instance or re-

quest of the shipper, nor does the evidence show that any such notation was made in pursuance of any instructions received from the shipper.

It is also claimed that the "waybills" found on pages 121-124 (Transcript of Record) designate the route by way of Atchison. These waybills our opponents persist in incorrectly designating in their brief as "bills of lading." Such designation must have been known by them to be incorrect, as the evidence plainly showed that they were not bills of lading issued to the shipper, but were merely *waybills* made out in accordance with a well-known practice by the station agent of the railway company and delivered by him to the conductor in charge of the train carrying the shipments for his guidance alone or for the use of connecting carriers. *It is not delivered to the shipper and is not intended for his inspection or use.* The designation of route found in the waybills was, therefore, merely a designation made, not at the request or in favor of the shipper, or plaintiffs, but for the convenience of the carriers alone and made at their own instance and in their behalf alone. Mere instructions which the carriers give to their agents in waybills and which emanate from the carriers themselves may be varied by the carriers at their option, as no rights of the shipper would be infringed by such variance.

It is further claimed (page 165, opponents' brief) that in a bond given after the disaster by the Empire State Cattle Company to the railway company to protect and indemnify the latter against expense incurred in taking care of and in pasturing the cattle after the flood had subsided, should the Cattle Company be

liable therefor, contained a recital that these cattle were routed by way of Atchison and that, such bond being accepted by the railway company, the recital became an admission against it and showed that the agreement was to carry the shipment by defendant's line via Atchison. It did not appear that the attorneys of the railway company, who were negotiating for an arrangement to make some disposition of the cattle after the flood, had their attention called to any such recital or that they knew of it at the time. They were evidently only interested in the covenants of the bond. They did not make the contract of shipment and, of course, did not know its terms. The statement quoted would at best be a selfserving one made by the Empire State Cattle Company after the disaster. Was it slipped into the bond by the astute counsel for the Cattle Company in the expectation of making some evidence on this point? The recital, however, has no such effect, as an examination plainly shows. The language is "said shipment to be transported over the line of The Atchison, Topeka and Santa Fe Railway Company, *or its connections, as shown by said contracts,* to Atchison, Kansas, and thence forwarded to Evarts, S. D., the point of destination."

In any event, therefore, we would be relegated to the contracts to see what they specify; but, according to this recital, the railway company "*or its connections*" were to transport to Atchison, and thence forward the cattle to Evarts, S. D. That would be accomplished by making delivery to the Missouri Pacific Company at Kansas City, as that company would trans-

port by way of Atchison and beyond and deliver to another connecting carrier.

When a shipper gives a carrier *specific* instructions as to lines of railroad over which he desires his goods to be transported or gives it specific directions in regard to a shipment, and the goods are so accepted, it may be admitted that the carrier ought not voluntarily to disregard such instructions without some reasonable necessity or justification therefor. If the carrier consents to receive the shipment with such specific instructions and no specific agreement is entered into, he undertakes to transport the same in accordance therewith. It is evidently altogether a matter of special agreement.

The rule is well stated by Chief Justice Shaw in an authority cited by our opponents, *Hastings* v. *Pepper,* 11 Pick. (Mass.), 41, where he says on page 43:

> "As the carriage is a *matter of contract,* as the owner has a right to judge for himself, what position is best adapted to carrying the goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix *his own rate for the carriage, or refuse altogether to take the goods with such directions,* the court are all of opinion that if a carrier *accepts goods for carriage, thus marked,* he is bound to carry the goods in the manner and position required by the notice."

In that case a package was marked to be carried a certain way. These instructions were disregarded and the package was damaged. It was held that it was for the carrier to prove affirmatively that the loss did not occur through disregard of the shipper's instructions. In that case it was fair to assume that the damage in

question was caused by disregard of such instructions and it was, therefore, held that the burden was upon the carrier to prove that the damage was not attributable to the breach of his contract but was occasioned *solely by the act of God,* or a public enemy, or the act or fault of the owner himself.

To the same effect see *Post* v. *Southern Ry. Co.*, 103 Tenn., 184; s. c., 52 S. W., 301.

To hold the carrier liable for departing from and disregarding special instructions of the shipper it must be shown that the carrier undertook to so carry under a special contract with the shipper in the manner designated, as such instructions or special arrangements impose upon the carrier different obligations than those imposed by the common law, which latter are merely to carry safely and deliver to the consignee at destination, or to a connecting carrier, as the case may be. It is well settled in the federal courts that a special contract on the part of the carrier, different from that imposed by the common law, cannot be inferred from doubtful expressions or loose language, but only from clear or definite evidence.

Myrick v. *M. C. R. R. Co.*, 107 U. S., 102-107.
Dixon v. *Columbus, etc., Ry.*, 4 Biss., 137; s. c., Vol. 7 Fed. Cases, p. 751, case No. 3929.

The Atchison Company, having two lines over which the cattle might be transported by it and delivery made to a connecting carrier in the route to destination, one to Atchison and the other to Kansas City, the one diverging at Topeka and the other at Emporia, it had the right to select such line of its own to fulfill its

agreement as under the circumstances during the transportation appeared to it to be reasonably safe. Indeed, under the contracts in these cases, plaintiffs would not be permitted to show that any special route was agreed upon, as that would be an attempt to add to the obligations of the contract and, therefore, to vary the same. Each carrier had the right to select and forward over any line or route controlled by it which appeared reasonably safe and expeditious.

White v. *Ashton*, 51 N. Y., 280, 284.

Hinckley v. *N. Y. C. & H. R. R. R.*, 56 N. Y., 429, 433, 434.

Snow et al. v. *Ind., etc., R. R. Co.*, 109 Ind., 422; s. c., 9 N. E., 702.

C. I. & L. R. R. v. *Woodward*, 72 N. E., 558; s. c., 164 Ind., 360.

Ind. R. R. v. *Remy*, 13 Ind., 518.

Patten v. *U. P. R. R.*, 29 Fed., 591.

Post v. *Southern Ry.*, 103 Tenn., 184; s. c., 52 S. W., 301.

Hutchinson on Carriers, 2nd Ed., Sec. 126a.

See also, generally,

Long v. *Rld. Co.*, 50 N. Y., 76.

Hudson Canal Co. v. *Coal Co.*, 8 Wallace, 276 and 288.

X.

AS DURING THE TRANSIT OVER DEFENDANT'S LINES A NECESSITY AROSE WHICH SHOWED THAT THE CATTLE COULD NOT BE DELIVERED BY IT TO THE BURLINGTON ROAD AT ATCHISON, AS IT HAD INTENDED TO DO, WITHOUT FURTHER DELAYS LIKELY TO INJURE THE SHIPMENT, IT WAS IN ANY ASPECT OF THE CASE JUSTIFIED IN ARRANGING FOR DELIVERY TO THE MISSOURI PACIFIC AT KANSAS CITY AND IN TRANSPORTING THE CATTLE TO THE UNION STOCK YARDS AT THAT PLACE. IN DOING SO THERE WOULD HAVE BEEN NO WRONGFUL DEVIATION EVEN IF THE CONTRACT HAD EXPRESSLY PROVIDED FOR CARRIAGE OVER ITS OWN LINE TO ATCHISON. IT WAS SIMPLY ACTING IN ACCORDANCE WITH A WELL ESTABLISHED CUSTOM.

As the stock had been already detained at Strong City for several days owing to the bad condition of the Burlington railroad and inability of that company to receive them at Atchison, the defendant's line between Topeka and Atchison also becoming impassable, defendant was justified in taking the cattle to Kansas City for delivery to another connecting line. Reasonable prudence under the circumstance required it to do so in respect to this shipment.

Moreover, the evidence clearly established a custom among railroad companies to detour the shipment or forward by another line where the one originally contemplated is unable or refuses to receive the shipment. (Rec., 202, 203.) *The contract of carriage is entered into in view of such custom, and indeed the railroad business of this country could not be carried on without such a reasonable custom.*

See *Hostetter* v. *Park,* 137 U. S., 31, 40, in which under the usage of the trade it was held to be no deviation to depart from the regular course of the ship.

Under the circumstances defendant should be considered as having done the best thing possible in the light of what was then known in having arranged with the Missouri Pacific to take the stock and in having transferred them to Kansas City for delivery there.

The cattle were deteriorating while in the pens at Strong City and Wellington and every one was anxious to have them sent forward. Mr. Frost, one of the shippers, was evidently chafing to have the stock go forward to destination by any available route. He wanted them sent around the flooded area on the Burlington road and even suggested their being sent by way of Superior, Neb. But the evidence showed that line was impassable and that in any event no arrangements could be made in time with succeeding connecting carriers to take them there and forward them to destination. It would have been unwise to take, and defendant would have been held negligent had it taken, the stock in the first instance to Atchison when a connecting line there had notified defendant that same could not be received there and there were no adequate facilities there for yarding such a large number of cattle. It would have been more than negligent when defendant's tracks at Valley Falls between Topeka and Atchison became flooded and the high waters at that point were rising for defendant to have attempted to take the cattle that way. To say the least, such a course would have resulted in delays, if nothing else,

which should have been anticipated and for which defendant would have been held liable.

If defendant had not used its other available line and made delivery at Kansas City to a connecting carrier as then appeared safe, it would have been held liable for damages resulting had it further delayed the shipment at Strong City.

Thus, in the case of *Receivers of M. K. & T. R. R. Co.* v. *Olive et al.*, 23 S. W., 526, it was held that where a railroad company had a way around a washout, by the use of which delay might have been avoided, it was liable to the shipper of livestock for the damage consequent upon delay. So, also, in *B. & O. R. R.* v. *O'Donnell,* 32 N. E., 476; s. c., 49 Oh. St., 489, a carrier was held liable for delay because it held a shipment of fire arms and ammunition until a tunnel on the usual way could be cleared of wreckage, when it might have sent them around by another way.

Our opponents would put the railway company "between the devil and the deep sea" and apply to it the old rhyme

> "You'll be damned if you don't;
> You'll be damned if you do."

This was a character of shipment which would not stand much delay in transportation. Defendant's agents were required to and did exercise good judgment in reference to the known conditions. It is a well settled rule in the law of agency which applies also to bailees, that where a deviation from instructions is due to necessity or unforeseen emergency not itself due to the agent's default, the agent using his best judgment to carry out the objects of the agency will not be

held responsible, although it should subsequently develop that another course would have been preferable. Acts done in a *bona fide* effort to save perishable property come within this rule. Where the instructions are obscure or ambiguous, an agent using his honest and diligent discretion in the interpretation of them will not be held responsible if he makes a mistake.

1 Am. and Eng. Ency. Law, 2d Ed., 1063 and 1064.

In the case at bar the defendant, however, had not completed the carriage over its own line when the emergency arose, and it was, therefore, at liberty to use any one of its lines which was open at the time so as to complete its contract of carriage and effect, if possible, a delivery to a connecting carrier, so that the goods might be carried to destination as expeditiously as possible, and it thus be enabled to earn its freight. By so transporting over its own lines it was not deviating from any instructions of the shipper, nor from any provisions in its agreement.

In 5 Am. & Eng. Ency. Law, 2d Ed., 424 and 425, which is in part quoted with approval on page 150 of opponents' brief, it is said:

> "The carrier may also excuse a deviation by showing that a sudden emergency required it, but the burden of showing such an emergency is on the carrier. In cases of emergencies which justify a deviation, and when the owner's consent might be fairly presumed, the carrier may act in contradiction or modification of the *letter of its instructions* but in all such cases should give notice to the owner as soon as practicable *of what has been done.*"

Frost, one of the shippers, and the agents of the other plaintiffs knew what had been done certainly on the arrival of the stock at Kansas City, but it is obvious from the above that no notice to the various owners would be necessary unless the carrier was going contrary to the specific instructions of the shippers. As the defendant was evidently pursuing the only available course at the time and that considered the best, and in accordance with established custom, there was evidently no necessity to obtain instructions from the shippers as the carrier was simply acting under the authority of its contract and was not going counter to any expressed wish of the shipper. It would have been impracticable to notify the different shippers and consignees and await instructions from each before doing anything. Again it is not at all likely that the new instructions would be harmonious or practicable.

Phelps, James & Co. v. *Hill*, L. R. (1891), 1 Q. B. Div., 605.

Questions of wrongful deviation generally arose under policies of marine insurance. Insurance was generally effected upon a cargo with reference to a known route or passage between the points designated, such route or passage being the one generally traveled by ships, and therefore considered safe—a reason having but little application to transportation by rail. It being, therefore, a matter of contract the insurance company had the right to claim that its liability did not attach if, without reasonable cause or excuse, the carrier departed from a well known and usually safe course into a course known to be circuitous or out of the usual way and apt to be more dangerous. Volun-

tary departure by the carrier from the contract without reasonable necessity would, of course, discharge the underwriter, as was held in *Insurance Company* v. *Leroy*, 7 Cranch, 26, cited by our opponents. A shipper, when taking out marine insurance, would have the same right to insist that if he lost or was likely to lose the insurance by reason of a wrongful or unreasonable deviation by the carrier, the carrier should have known that such a result would have followed from his breach of the contract of transportation, and should, therefore, be held liable for the loss sustained. Where a shipper, however, had effected no insurance in view of any route, it would seem that he would have to show that the damage claimed was one which the carrier ought to have anticipated or contemplated as likely to result if it broke its contract of carriage.

Speaking upon this point, Mr. Justice Holmes, in the *Globe Refining Company* v. *Landa Cotton Oil Co.*, 190 U. S., 544, quotes with approval the following language:

> "A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract."

He cites with approval the leading case of *Hadley* v. *Baxendale*, 9 Exch., 341, 354, which lays down the above rule as to damages recoverable against a common carrier in case of a breach of its contract.

Many authorities, therefore, simply hold that where the carrier disregards the instructions of the shipper and thereby breaks his contract he assumes the obligations of a common carrier at common law or the common law liability, and cannot claim the benefit of exemptions contained in a special agreement.

See Elliott on Railroads, Sec. 1515.

But at common law the carrier would be excused for damages caused by an act of God, such as the one in question, as that is something which could not be reasonably expected or provided against.

So in voluntarily deviating *without necessity* or excuse from a route specifically designated or requested by the shipper, the carrier would also incur liability for those consequences which were likely to follow by reason of the known differences between the route designated by the shipper and the one followed by the carrier without lawful justification. If the latter be more circuitous there would be the incident delay. If more dangerous on account of known natural perils there would be the dangers of the greater perils likely to be encountered. If more dangerous on account of inadequate police protection due to an unsettled condition of the country, there would be the dangers of robbery. But all these dangers are such as are then likely to be encountered and should be anticipated as a reasonable consequence of departing from express instructions of the shipper.

The authorities, therefore, recognize that in the case of common carriers there may frequently arise either a necessity or a reasonable cause for departing even from specific instructions of the shipper, and certainly from departing from what would otherwise be the usual or ordinary route for the transportation. The established custom among railroads recognizes such necessity. With reference to railroad companies, the same reasons do not exist for requiring a strict pursuit of the ordinary route except in a few exceptional cases

where a departure therefrom would be known as likely to result in damage to the shipper.

In the case of *Hostetter* v. *Park*, 137 U. S., 30, which is cited by our opponents, it is said on page 40, citing a number of cases:

> "A deviation is defined to be 'a voluntary departure *without necessity or reasonable cause*, from the regular and usual course' of a voyage, in reference to the terms of a *policy of marine insurance;* but it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the *usage of the trade.*"

After citing authorities it is then stated:

> "The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage."

In the case of *Constable* v. *The National S. S. Co.*, 154 U. S., 52, also cited by our opponents, *it was held that the landing of a cargo at a different pier than that owned or controlled by the steamship company and designated as its pier in its bill of lading, was not a deviation so as to render the steamship company liable for a loss by fire at such other pier.* The only reason given for taking the cargo to such other pier was that there was no room at the pier of the defendant steamship company. It was also held that libellants, having taken no steps on the faith of the cargo being unladed at defendant's pier, were not prejudiced by the change. On page 66 it is said:

> "It is claimed, however, that the berthing of this ship *at a pier other than her own was in legal effect a deviation*, which rendered the company an in-

surer of the cargo discharged at such pier *without notice,* until its actual delivery to the consignee. In the law maritime a deviation is defined as a 'voluntary departure *without necessity, or any reasonable cause,* from the regular and usual course of the ship *insured.*"

It is true that in the opinion in the above case as stated by our opponents, the case of *Michaels* v. *N. Y. C. R. R.,* 30 N. Y., 564, in which an antecedent negligent delay was held not to excuse the carrier for damages caused by subsequent flood, is referred to, but it is referred to merely by way of argument or illustration. That case has been cited to, but disapproved by this court in the case of *Railroad Company* v. *Reeves, supra,* involving the same question.

In Ray's Negligence of Imposed Duties, page 317, it is said:

> "There is a class of cases in which an agent is justified, by an unexpected emergency, *in deviating from his instructions,* where the safety of the property requires it * * * but while a deviation cannot be made for the mere convenience of the carrier, without rendering it liable for the injury which may result; yet, such *deviation from the instructions of the shipper* may be made in the case of an unforeseen necessity, and a necessary change of route or means of transportation is justifiable—as forwarding perishable freight by rail where a storm prevents a boat from proceeding on its voyage."

In *International, etc., Ry. Co.* v. *Wentworth,* 27 S. W., 680 (Texas), a deviation from the stipulated route was held justifiable on account of floods.

In the *Propeller Niagara* v. *Cordes,* 21 Howard,

7, Mr. Justice Clifford, on pages 24 and 25, said in part:

> "A deviation from the direct route may be excusable if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates. * * * As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from doing so by some cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delays and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; *and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance*, it becomes his duty under such circumstances to procure it and transport the goods to their place of destination, and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured."

In *Patrick* v. *Ludlow*, 3 Johns. Cas., 10; s. c., 2 Am. Dec., 130, it appeared that the master of a vessel received information that French privateers were cruising in the windward passage and in the usual route from Surinam. He, therefore, determined to take the leeward passage, and touched at Demarara to take the protection of a British convoy then about to sail. A few hours after his arrival there the vessel was driven to sea in a gale of wind and afterwards continued her voyage without convoy and was captured by a French privateer. In an action on an insurance policy this was held not to be a deviation as the mas-

ter had acted *bona fide* and with the sole view of avoiding danger and to seek the safest course home. In the opinion it is said in part:

> "It remains to be considered whether the route to the leeward or the touching and stay at the port of Demarara, will amount to a deviation. * * * From the testimony in this case there is nothing to impeach the motives of the captain. He appears to have acted *bona fide* and for the security of all concerned. It is well known that those seas were infested with privateers at the time. * * * The resolution to take this passage, if not at all times proper, was, I think, under those circumstances justifiable, to avoid danger, and ought not to be deemed a deviation."

In the case of *Reade* v. *Comm. Ins. Co.*, 3 Johns., 352; s. c., 3 Am. Dec., 495, a vessel was insured from New York to Bordeaux. She had French passengers on board. The owners of the vessel instructed the master to proceed through the Sound so as to avoid risk of detention by British cruisers then off Sandy Hook. The master went through the Sound as directed instead of going through the Narrows and by way of Sandy Hook, the most *usual* and least dangerous route for vessels. In an action on the insurance policy this was held not to be a wrongful deviation.

The court said:

> "If there were no evidence in this case to justify the departure of the ship from the most usual and ordinary course, we are inclined to think that here would have been a deviation; but under all the circumstances, we consider that there was a just and *reasonable ground* for such departure, *though there may not have been an absolute necessity for it.*"

In *Regan* v. *Grand Trunk Ry.*, 61 New Hamp., 579, the prevalence of a severe storm prevented the goods

from going by steamer (as routed), they were sent by railroad and lost. It was held that the carrier was not liable, since the necessity warranted the deviation. The following principles were laid down:

> 1. A common carrier receiving goods to be forwarded to points beyond his route, in case of an interruption of the stipulated line of transportation, is bound to use all reasonable means such as a prudent owner would take if he were present to protect the property from unnecessary damage or loss.
>
> 2. What constitutes reasonable care in such an emergency, and whether it is the duty of the carrier to forward the goods by a different route, are questions to be determined with reference to all the circumstances.
>
> 3. Neglect to notify the consignee of a change of route does not render the carrier liable for loss or damage happening from delay in the delivery of the goods, if such notice would not have avoided the injury.

See also

Foster v. *Great Western Ry. Co.*, L. R. (1904), 2 K. B. Div., 306.

Phelps, James & Co. v. *Hill*, L. R. (1891), 1 Q. B. Div., 610, 611.

THE AUTHORITIES CITED BY PLAINTIFFS DO NOT CONTROVERT THE RULES CONTENDED FOR BY US AND MANY OF THEM ARE WHOLLY INAPPLICABLE.

A careful examination of the authorities cited in our opponents' brief on the question of wrongful deviation will show that they do not controvert the rules laid down in the foregoing cases. We shall not attempt to criticise all of them in detail.

In the case of *Davis* v. *Garrett,* 6 Bingham, 716 (cited by opponents), before Chief Justice Tyndall in the Court of Common Pleas, decided a number of years ago, and which is frequently cited on the question of wrongful deviation, there was involved the loss of a shipment of lime carried by boat. It was alleged in the declaration that defendant undertook to carry the lime from one port to another by the usual and customary passage, "perils of the sea" excepted, but that he voluntarily and *unnecessarily* deviated from such usual and customary passage and that during the alleged wrongful deviation and while the barge was out of her course, in consequence of violent and tempestuous weather, sea water communicated with the cargo of lime, which became heated, setting the barge on fire, by reason of which both lime and barge were entirely lost. These allegations were established at the trial, it appearing that defendant deviated from the customary course of the voyage mentioned in the declaration *without any justifiable cause.* There was nothing unprecedented in the condition of the weather and the storm was such as might have been anticipated. Defendant having gone out of the usual course agreed upon was bound to anticipate the peril of storms and was, therefore, not entitled to the exemption contained in the bill of lading from liability on account of "perils of the sea."

In the earlier case of *Max* v. *Roberts,* 12 East, 89, a declaration charging wrongful deviation was held to be bad which did not allege an agreement on the part of the defendant to carry by the particular route or course though the direct one from which it was

claimed that there was an unauthorized or wrongful deviation.

In *Crosby* v. *Fitch*, 12 Conn., 410; s. c., 31 Am. Dec., 745, cited by opponents, defendant started out on a voyage without apparent necessity at the time, and, instead of going through the sound, took an unusual route and one evidently not calculated to be pursued by a small boat of that character. As the court found there was no necessity to start out on the journey at the time, it was held the carrier could not take advantage of an exception in the bill of lading "against the dangers of the sea," but was to be treated as assuming the obligations of a common carrier over the new route. It appeared further that the cotton was shipped on the declaration of the master to the agent of the owner that he should sail as soon as the ice broke up in the Sound. It was usual for vessels thus situated to remain in the port of New York until the Sound broke up, as claimed by plaintiffs. An unusual route was pursued rather than the usual route through the sound. The court held the defendants responsible as common carriers, but in the opinion it is said:

> "*The distinction is a very obvious one between the present case and one in which a vessel already on her voyage and in transit departs from the usual route, by reason of obstructions of this nature, or of blockades, etc. In such cases the master must act; a necessity is thrown upon him, and if he is governed by a sound discretion, he stands justified.* But here it may as well be claimed that the master would be justified in leaving a safe port during the existence of a violent tempest, or in the face of blockading or embargo restrictions, because it might be uncertain how long these impedi-

ments would be in his way. The port of destination in this voyage was Norwich; and it is conceded that the obstruction caused by ice to the navigation of the River Thames, usually continues several days longer than the Sound continues frozen. The master, therefore, knew, that he could not complete his voyage earlier in consequence of the course he adopted."

That case involved a shipment of cotton which could not have been affected in the slightest degree by a delay in the commencement of the voyage.

In the case of *Rld. Co.* v. *Beck,* 125 Pa. St., 620; s. c., 17 Atl., 505 (cited by opponents), plaintiff shipped over defendant's road goods marked "via P. care of A. Coast Line, by fast freight," and defendant delivered the goods at "P" to a steamship company, in whose possession they were destroyed by fire. In that case, as defendant had without necessity violated positive instructions by the shipper, it would of course be held as a common carrier during the entire transportation and as such would be liable for a loss caused by fire. There was no apparent necessity for the carrier to go counter to the express instructions of the shipper.

So in *Philipps* v. *Brigham,* 26 Ga., 617, cited by opponents, defendants pursued an extraordinary and unusual route without any reasonable necessity therefor.

So in *Rld. Co.* v. *Cole,* 68 Ga., 623, cited by opponents, goods were delivered to be forwarded by a specified line and were not so forwarded by the first carrier. No reasonable necessity existed for disregarding the instructions of the shipper, or the con-

tract of the parties, was shown by the carrier. The same is true of the case of *Sager* v. *Rld. Co.*, 31 Me., 228 (cited by opponents), as there the carrier acted in disobedience of directions given by the owner and assented to by the carrier respecting the mode of conveyance.

That was true also of the case of *Cassilay* v. *Younge*, 4B. Monroe, 265 (cited by appellants).

The same was true of the case of *Rld. Co.* v. *Washburn*, 22 Oh. St., 324, cited by opponents, for in that case it was said, as appears from the quotation made therefrom by plaintiffs:

> "If these instructions" (of the shipper) "be without restriction as to the subsequent route, intermediate consignment or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of transit, with the like general instructions in terms sufficiently explicit and unambiguous to inform him of their ultimate destination."

In the case of *Brown & Haywood Co.* v. *Pacific R. R. Co.*, 63 Minn., 546 (cited by opponents), the defendant carrier received a shipment from plaintiff to be carried to a point beyond defendant's line *with instructions from plaintiff* to deliver them to a certain connecting carrier. The shipper had made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points for unloading and certain portions of the goods delivered to each point. The goods being forwarded by another line than that agreed upon, the shipper was

obliged to pay extra charges for unloading and for this the initial carrier was held liable. It may be said that this case was wrongly decided for if the initial carrier was not advised of the contract between the shipper and the connecting carrier for a special privilege it could not be held liable under the rule established in *Hadley* v. *Baxendale*, 9 Exch., 341, 354, or in *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S., 544.

The case of *Hastings* v. *Pepper*, 11 Pickering, 41 (cited by opponents), has been referred to heretofore. The carrier was held liable for disregarding instructions given by the shipper upon which the goods were accepted, unless he could show that the loss was caused through the act of the shipper or an act of God. No necessity was shown for deviating from the instructions given.

In *Proctor* v. *Ry. Co.*, 105 Mass., 512 (cited by opponents), the defendant carrier agreed to convey the goods to Boston and forward them thence by a certain specified express. Instead of doing so they were forwarded by another express company at a cost greater than would have been the cost of transportation by the express company designated, and the initial carrier was properly held liable for the difference in such cost.

In *G. H. & H. R. R. Co.* v. *Allison*, 59 Tex., 193 (cited by opponents), it appears on page 195 that the general agent of the transportation company promised and agreed that the melons shipped should go through to Chicago without breaking bulk and without transfer.

This agreement was wholly disregarded and a loss ensued therefrom, for which the carrier was held liable. No reasonable excuse for deviating from the agreement was offered.

In the case of *Johnson* v. *N. Y. C. & H. R. R. R. Co.*, 33 N. Y., 610; 88 Am. Dec., 416 (cited by opponents), hemp was shipped over defendant's line under *positive instructions from the shipper* to forward it via the People's Line of steamboats to New York City. Because the shipment was refused by the boat designated, the initial carrier forwarded it by another line. As it had performed its duty when it carried to the end of its line and offered the goods to the connecting carrier, it was held that it should not have forwarded the goods by a mode *prohibited* by the owner without notice. There was no occasion or necessity to disregard the positive instructions of the shipper. In the opinion it was said:

> "There is a class of cases in which an agent is justified by an unexpected emergency in deviating from his instructions, where the safety of the property requires it. In this instance no such exigency arose. The only inconvenience which would have resulted to the owner from compliance by the carrier with his *known wishes* would have been mere delay in transmitting the hemp to market; *and he (the shipper) had notified the company that he would rather submit to this delay than to the hazard of towboat transportation at the close of the season of navigation.*"

In *Goodrich* v. *Thompson*, 44 N. Y., 324 (cited by opponents), there was an express contract to forward the goods by a particular steamer. As it appeared that this steamer was withdrawn from the service the

carrier would not have been subjected to a liability by holding the goods at its own terminus until it received further instructions, and so it was held that it should have then notified the owner and awaited instructions.

In *Maghee* v. *Rld. Co.,* 45 N. Y., 514 (cited by opponents) it was simply held that if a carrier violated its contract to carry in a particular way, or by a particular route, it could not avail itself of any exception against liability contained in such contract.

The same was true in *Robertson* v. *National Steamship Company,* 14 N. Y. Supp., 313 (cited by opponents). The damage in that case was not caused by an act of God and the decision was therefore simply to the effect that the carrier by deviating from the express terms of its contract could not claim any exemption contained therein. Having violated the agreement and thus terminated the same it could not claim the benefit thereof.

In *Seavey Co.* v. *Union Transit Co.,* 106 Wis., 394; s. c., 82 N. W., 285 (cited by opponents), the defendant, for reasons of its own convenience, disregarded its express contract as to the mode and route of transportation, and it was held liable for damages caused by freezing of the goods while upon the unauthorized route.

In *Ry. Co.* v. *Brichetto,* 72 Miss., 891 (cited by opponents), vegetables were consigned to a northern market. Because the connecting lines would not receive the same on acount of a strike, the carrier instead of sending them by another available route, without consulting with the shipper, diverted them to a

southern market, where they were sold. The mere statement of the case shows its inapplicability.

So, in *Rld. Co.* v. *Odill*, 96 Tenn., 61; s. c., 33 S. W., 611 (cited by opponents), the initial carrier unjustifiably substituted another connecting carrier for the one named in the bill of lading, and without authority from or notice to the shipper, the potatoes in question were sold.

In *Merchants Despatch Co.* v. *Kahn*, 76 Ill., 520 (cited by opponents), no necessity was shown for transporting the goods over the devious routes selected.

In *Express Co.* v. *Kountze*, 8 Wallace, 342 (cited by opponents), the carrier had two lines over which the property might have been sent. The more expeditious route was through Missouri, but which owing to unsettled conditions there prevailing on account of the rebellion then in progress was hazardous. The longer route, through Iowa, was less dangerous on that account. *Plaintiff notified defendant's agent not to send the gold dust via the Missouri route.* Notwithstanding this warning and *the known danger from such a route* the gold dust was sent by the express company over the more dangerous route and was captured by a band of armed men. It was a pure case of gross negligence in the selection of the more hazardous although more expeditious route. Under the circumstances the carrier should have selected the longer route. For this reason it was held that the express company was not entitled to the benefit of exemptions contained in its bill of lading.

In the case of *L. & N. R. R. Co.* v. *Duncan*, 137 Ala.,

446; s. c., 34 Southern, 988 (cited by opponents), livestock was transported over an initial line and when it arrived at the point for delivery to a connecting carrier *which had been designated by the shipper,* that carrier refused to receive it, and it was thereupon sent by a circuitous route to destination without any notice to shippers. The carrier was held liable for delay on the principle that it was his duty, on the refusal of the connecting line to accept the shipment, to notify the shipper, and obtain therefor further shipping or forwarding directions. But in that case it was held that where a connecting carrier over whose line a shipment was routed refused to receive and transport the same, in the absence of notice of such refusal to the consignor, the initial carrier was liable only for the exercise of ordinary care and prudence in selecting another carrier to transport the consignment, and was liable for injuries to the consignment caused by delay from the selection of a carrier having a circuitous route which might have been avoided, as there was a more direct route open.

In the last case cited by opponents, *G. C. & S. F. Ry. Co.* v. *Irvine,* 73 S. W., 540 (Texas Civil Appeals), the shippers demanded that their cattle be shipped over appellant's line from San Angelo to Brownwood, Texas, and then over the line of the Fort Worth and Rio Grande Railway Company. This the appellant refused to do and routed the cattle over its line by way of Temple and Cleburne, a distance of 115 miles further than the route desired by the shipper. In that case, however, it was held that no damages were shown

by the plaintiff as resulting from this routing, and therefore no recovery was allowed upon that ground, and that it was error to submit questions of damages on that account to the jury; but it was also held in that case that in the absence of the selection of a route by the shipper the initial carrier may choose the same, having due regard to the shipper's rights. That case is not at all pertinent.

It is obvious that in the foregoing cases, cited by opponents, where it was said that the carrier should have given notice to the shipper of the deviation from the route agreed upon, that the carrier had completed the transportation over its own line and was only acting in the capacity of a forwarding agent for the shipper.

In the case of *Constable* v. *National Steamship Co.*, 154 U. S., 52, heretofore cited by us, it was claimed that the steamship company was liable for landing a cargo at a different pier than that owned by it *without notice.* Notwithstanding such claim, it was held that the steamship company was not liable.

It is also suggested that in transporting the cattle to Kansas City the defendant used the railroad of the St. Louis and San Francisco Railroad Company from Olathe to Kansas City. This does not seem to be supported by the evidence because Mr. Frost testified that in the morning they passed through Argentine, which was on defendant's line near Kansas City. If, however, the Frisco Railroad between Olathe and Kansas City was used by defendant, it was a shorter and more direct route than defendant's line from Olathe

via Holiday to Kansas City. Such line was evidently not used unless there was some reasonable necessity therefor, as, possibly, that defendant's line at Holiday was flooded. But no loss or damage occurred while the cattle were being transported or detoured by defendant over the Frisco Railroad, and long before the disaster took place the defendant had gotten upon its own line of railroad in getting into the Union Stock Yards.

There was, however, no deviation at all from any route specified in the contract. The action of the defendant railway company in taking the cattle to Kansas City was such as common prudence dictated in view of the conditions then existing, and was in accordance with the established custom. At the time of making the contract of shipment the shippers evidently were not much concerned about the route, as long as the cattle would be transported to the point of destination with reasonable expedition. They were evidently merely concerned about the through rate, which, however, was guaranteed by the initial carrier under the contract.

But suppose the shipper had given specific directions as to the route and the defendant company had expressly agreed to transport by such route and there existed no necessity to deviate therefrom, the defendant would in such event only be regarded as having violated or broken its agreement, and, while by reason of such breach, it could not then claim the benefit of any exemptions contained in such contract, yet could it be held to any greater liability than that imposed

ne common law in the absence of an express con-
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it had broken an express agreement (which was
he case) could it be held as having contemplated
the result of such breach would be that the cattle
d be thereafter damaged by an unexpected catas-
ne falling unquestionably within the category of
ct of God? Could the breach in such case be re-
ed as the proximate cause of the subsequent dam-

Could such damage have been reasonably con-
lated as likely to flow from the failure of the car-
to carry by the specified route?

is sometimes suggested that if the carrier chooses
isregard the positive instructions of the shipper,
oes so at his own risk, but under all the authorities
l by our opponents, it is apparent that the ques-
of routing is a matter of contract, and if the car-
breaks its contract in that respect, it is only liable
such damages as ought to have been anticipated as
y to flow from or be incurred by the breach. That
distinctly held in *R. R. Co.* v. *Reeves*, 10 Wallace,
where, referring to the claim that there was a spe-
agreement to start the tobacco on the evening be-
the casualty, the court says:

"Even if there had been such a contract, the
failure to comply would have been only the remote
cause of the loss."

CONCLUSION.

It is evident that the defendant cannot be held liable upon any of the grounds stated in the complaint. It was not negligent in detaining the cattle at Wellington or Strong City on account of refusal of the Burlington Road to receive the shipments at Atchison, or pending negotiations with the Missouri Pacific to accept the same as a connecting carrier. In any event, if such delay be regarded as negligent it was not the proximate cause of the injury.

Neither was defendant negligent in taking the cattle to the Kansas City Stock Yards for delivery to the Missouri Pacific Railway Company at the time, since at such time no one anticipated that a flood of such an extraordinary and unprecedented character would overtake or overwhelm the shipment while in the stock yards and before they could be taken out by the connecting carrier. Here again the flood was the proximate cause of the injury and not the act of the defendant in taking the cattle to Kansas City for further transportation by a connecting carrier to destination.

Neither was defendant guilty of negligence because the agents of the Stock Yards Company did not drive the cattle out of the yards somewhere into the country but drove them upon the viaducts above the yards, because the latter place was apparently safe and because at that time the cattle were not in the custody of the defendant.

Neither was there any wrongful deviation from

the terms of the shipping contract nor from any instructions given by the shippers. Indeed there was no departure whatever from defendant's contract, which was simply to carry over its own line and deliver to a connecting carrier, to be forwarded to destination. As the Burlington Company was unable to receive the shipment at Atchison it was necessary for the defendant to arrange for delivery to a connecting line at Kansas City. The line to Atchison becoming impassable, the only route left open was that via Kansas City. Defendant was acting in good faith in accordance with the apparent wishes of one of the shippers, who was in charge of the shipment; and in arranging with the Missouri Pacific to receive the cattle at Kansas City it was pursuing the usual course or custom of forwarding such shipments on account of the prior refusal of the Burlington Road to receive that shipment at Atchison. As it disobeyed no instructions of the shipper, but was acting for the best interests of all concerned, it should not be held liable for the result of a catastrophe which no one anticipated.

We, therefore, respectfully submit that the judgment of the Circuit Court in favor of defendant was just and proper and the same should, therefore, be affirmed.

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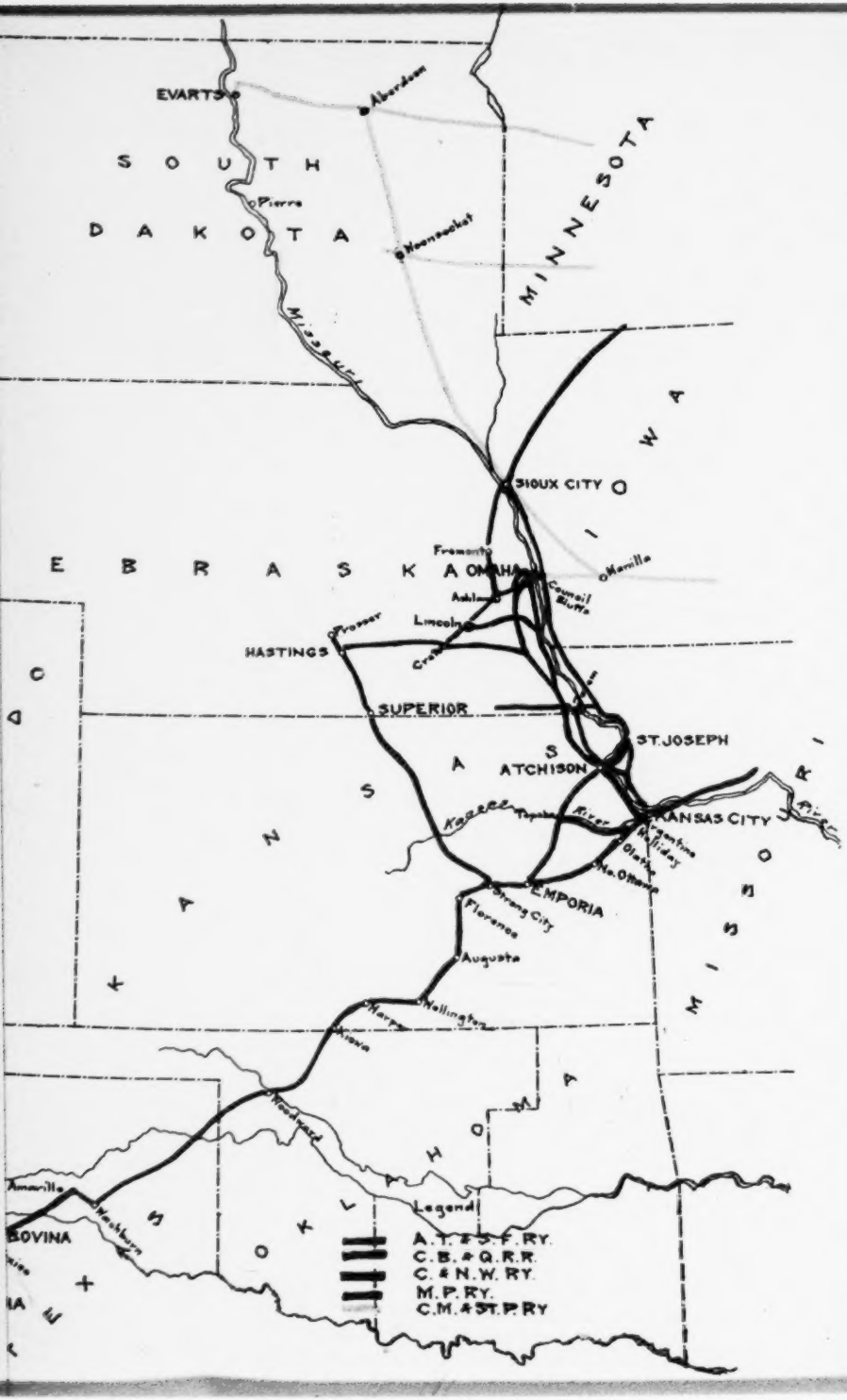
Attorneys for Defendant in Error.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Woodward
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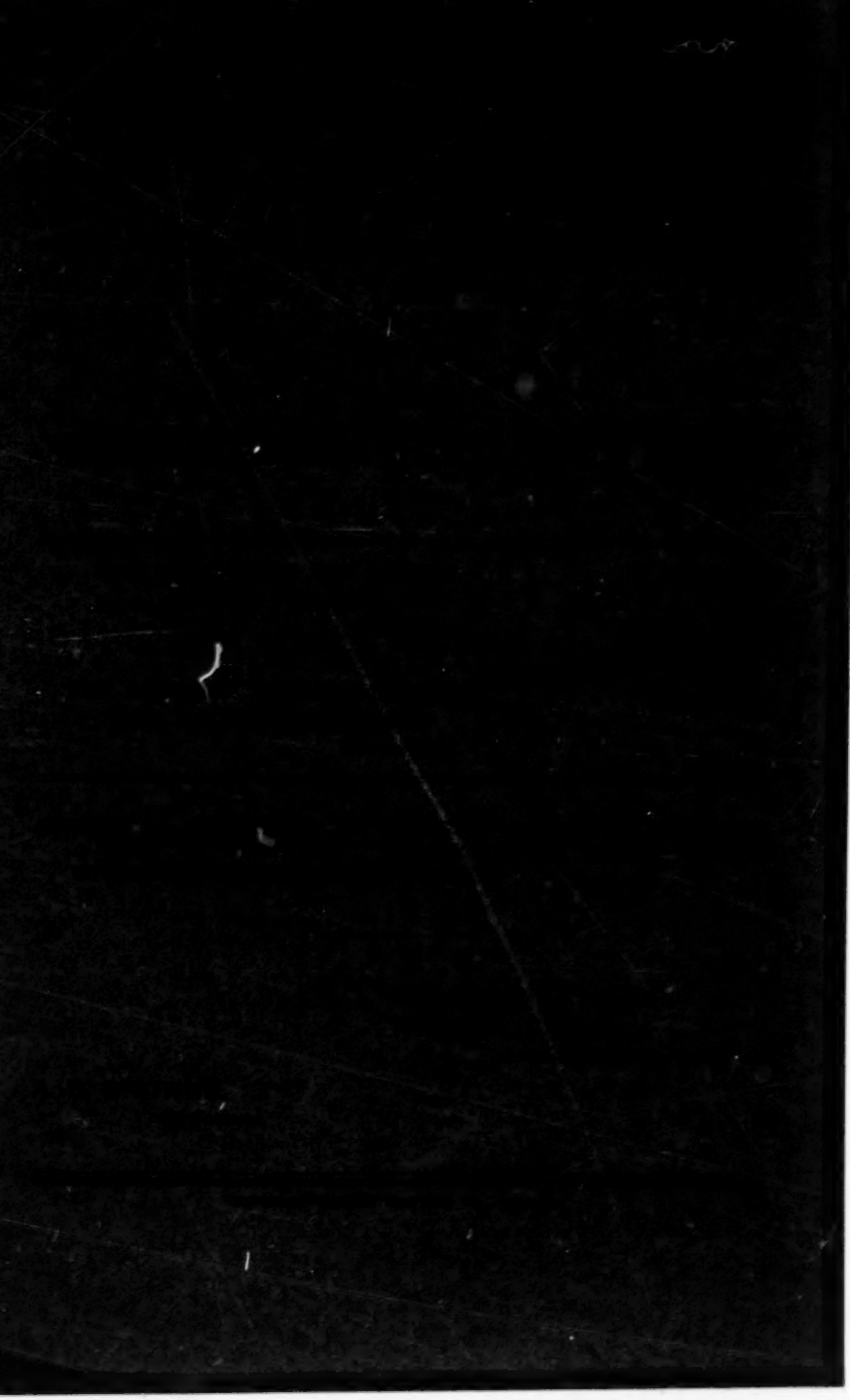

IN THE

Supreme Court of the United States.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,* *vs.* **THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,** *Respondent.*	No. .....

ANSWER IN OPPOSITION TO PETITION OF PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

For answer to the petition of petitioners for a writ of *certiorari* proposed to be made to this Honorable Court, the respondent, The Atchison, Topeka and Santa Fe Railway Company, respectfully represents and shows as follows:

The questions involved and the facts in this case are substantially the same as those in the case of the *Empire State Cattle Company et al., Petitioners,* v. *The*

Atchison, Topeka and Santa Fe Railway Company, Respondent, in which a writ of *certiorari* is also asked. This case is based upon the same bill of exceptions as that found in the Empire State Cattle Company case. The evidence is the same, the instructions requested and the rulings of the trial court are the same, and there is the same assignment of errors.

The same points are now presented in this case as are set forth in the application of the Empire State Cattle Company case for a writ of *certiorari.* The ruling of the Circuit Court of Appeals, for the Eighth Circuit, in this case is the same as the ruling made by that court in the Empire State Cattle Company case, and, therefore, there exists no more reason for the issuance of the writ of *certiorari* in the present case than in the other case. It will not be necessary, therefore, to make any extended answer to the present application, but we shall rely very largely upon our answer to the petition in the Empire State Cattle Company case.

The shipments of cattle in this case were made in pursuance of a written live stock contract set up in the answer of the defendant (Rec., 11-12) and which, under the Kansas practice, is admitted to be the contract of the parties, there being a failure to deny the same under oath in the plaintiff's reply. This live stock contract was made by The Pecos Valley & Northeastern Railway Company on behalf of itself and connecting carriers with the Minnesota & Dakota Cattle Company, and involved shipments of cattle from Kenna, New Mexico, consigned to the Minnesota & Dakota Cattle Company at Evarts, South Dakota. No

routes or lines are specified in this contract. (Rec., 17-18.) The endorsement on the contract is "Kenna, N. M. to Evarts, S. D." (Rec., 17-18.)

In this case a portion of the cattle was held at Wellington and a portion at Strong City on account of a washout on the Burlington road whereby that company was unable to receive the cattle at Atchison, as in the other case, and a part of respondent's line of railroad between Topeka and Atchison having become submerged so as to be impassable, the cattle in this case, as in the other case, were taken to the Union Stock Yards at Kansas City for delivery to the Missouri Pacific Railway Company, which was the only way then available, in accordance with an arrangement made with that company to receive the same there, but before they could be taken out of the Union Stock Yards the unprecedented and unexpected flood of the Kansas River so submerged the stock yards on the night of May 30th and the morning of May 31st that it became necessary to drive these cattle with others upon the viaducts in the Union Stock Yards, and because the waters did not recede as rapidly as they came on it was necessary to hold the stock there for several days. Owing to inability to feed the same, on account of the dangerous character of the flood, they suffered the damage complained of.

In this case, as in the other case, the plaintiff asked for a peremptory instruction, which was refused and excepted to, and, after the court had ruled upon defendant's request and given the same and directed the jury to return a verdict for the defendant, plaintiff then requested thirteen different instructions, the same

as in the Empire case. None of these instructions was properly before the Circuit Court of Appeals, as error in respect to any particular instruction was not properly assigned. The peremptory instruction asked for by plaintiff was, as in the other case, general, not being confined to any particular question of law or fact.

There are many misleading statements in the petition in this case, as in the other case. There was no evidence in this case that the shipper directed the carriers to transport the cattle by any particular routes or lines, and there was no undertaking in this case, on the part of respondent, to carry the cattle by any particular one of its own lines. The same necessity existed for taking the cattle to Kansas City in this case as in the other case. Delivery to a connecting carrier could not have been made in any other manner or at any other place than at this terminus on its line, and the agents of petitioner in charge of the shipment were impatient at the delay at Strong City and Wellington.

The unprecedented flood in the valley of the Kaw River did not commence to rise on May 15th, 1903, as stated by petitioner; on the contrary, the unprecedented flood was caused by an unusually heavy rainfall in middle, western and northern Kansas on May 28th, and because of the saturated condition of the soil, on account of previous rains, all of the water ran off into the rivers, and the flood waters at Kansas City were not unprecedented until the night of May 30th and the morning of May 31st, 1903.

There was no wrongful deviation in this case from any route or line agreed upon, nor from any instruc-

tions given by the shipper. The routing specified in the way-bills, as stated in the other case, was the route fixed by the carriers for their own convenience, and without any agreement with the shipper. The route by way of Atchison would have been pursued if feasible at the time; but owing to the flooding of a portion of the track between Topeka and Atchison it was necessary for respondent either to move the shipment to Kansas City, to deliver to a connecting carrier, or to hold it for an indefinite period at Strong City and Wellington.

It is quite erroneous for petitioner to state that by the shipping contract of the parties the cattle were routed to go by way of Atchison.

When the shipment arrived at Olathe, it was then found that a portion of the respondent's tracks between Olathe and Kansas City was under water, so that it was necessary to use the tracks of the St. Louis & San Francisco Railroad Company to get to the Kansas City Stock Yards. The stock yards were then safe, and it was naturally supposed that they would remain safe.

The cattle were taken to the Union Stock Yards at Kansas City and left in the custody of the agents of the Union Stock Yards Company for the benefit of the Missouri Pacific Railway Company; and the agents of the Stock Yards Company took all the care of the cattle that could be expected under the circumstances.

The statement of petitioner that defendant's roads in Kansas from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City were all flooded from an early hour on the morning of Fri-

day, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded from an early hour on the morning of Friday, May 29, 1903, is not accurate. A portion only of these tracks was flooded, but the Emporia cut-off to Kansas City, which was being pursued by the defendant, was at that time open, but as the shipment approached Olathe it was then found that a portion of the tracks between Olathe and Kansas City—but a portion only—was impassable on account of water, and this rendered it necessary to haul the shipment over the tracks of the St. Louis & San Francisco Railroad Company into Kansas City. It is true that at that time a portion of the line to Atchison was under water, and that line was, therefore, impassable; and this was the occasion and necessity for taking the shipment to Kansas City.

The statements of petitioner are, in many respects, exaggerated. There is no warrant in the record for the statement of petitioner that defendant "knowingly and willfully went into the mouth of the flood at its climax." Neither is there any warrant in the record for the statement of petitioner as follows:

"It was therefore reckless, if not madness, for defendant, having detained petitioner's cattle at said Strong City and Wellington over two days, to attempt to reach or get across the Kaw River after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river."

This statement is contradicted by the statement in the petition which almost immediately follows, to the effect that Mr. Kendrick, one of petitioner's witnesses, live stock agent at Kansas City of the Burlington road, testified that his company could have taken peti-

tioner's cattle out of Kansas City, north, across the Kaw River, on the afternoon of Saturday, May 30th, 1903. The latter statement, if true, would conclusively show that the stock yards were regarded as safe at that time. The reason, of course, why the shipment was not given to the Burlington road then was that the defendant had already arranged with the Missouri Pacific Railway Company to receive the shipment at the Union Stock Yards at Kansas City. This fact, however, is not stated by petitioner, although it was undisputed.

Criticisms which we have made upon statements of petitioner in the Empire State Cattle Company case are pertinent to the statements of petitioner in this case. The same authorities are applicable and as to points raised in this case they are identical with those raised in the petition of the Empire State Cattle Company. We, therefore, respectfully refer to our answer to the petition of the Empire State Cattle Company et al., for a writ of *certiorari*, as containing a complete answer to the petition in the present case. A more extended showing is not necessary here.

The judgment in favor of the defendant was right, and no occasion exists for issuing the writ of *certiorari* to review the action of the lower courts upon the evidence.

Respectfully submitted,

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Respondent.

A. B. BROWNE,
Of Counsel.

In the

Supreme Court of the United States

THE MINNESOTA AND DAKOTA FIRE INSURANCE COMPANY, *Petitioner*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

No. [redacted]

PETITION

FOR THE ISSUE OF THE WRIT OF CERTIORARI HEREIN, TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

R. E. BALL and
JAMES S. BOTSFORD,
Attorneys for Petitioner.

—IN THE—

Supreme Court of the United States

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

No.

PETITION

FOR THE ISSUE OF THE WRIT OF CERTIORARI HEREIN, TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

Petitioner, for the purpose of obtaining a writ of *certiorari* herein, represents as follows, to-wit:

This suit was brought by petitioner as plaintiff against respondent as defendant, in the Circuit Court of the United States for the District of Kansas, First Division. The case is an action at law to recover about Forty-two Thousand Dollars damages, for the death of a portion and injury to the residue of 2,293 head of cattle belonging to plaintiff, which were shipped over defendant's railway through the State of Kansas. The cattle

were purchased by the plaintiff, in Texas, and were shipped over defendant's road, destined to go to the pastures of the plaintiff in South Dakota.

The action was instituted about the same time as that of the action of he Empire State Cattle Company, *et al.*, against the same defendant, in which case the plaintiffs as petitioners have also filed in this court their petition for the issuance of the writ of *certiorari*. The two cases have been and are companion cases. They were tried at the same time to the same jury, and though separate verdicts were taken, separate judgments entered and separate bills of exceptions allowed and filed in each case, the bills of exception were identical. It was on that account stipulated in the Circuit Court of Appeals (Record *Empire State Cattle Co. et al.* v. *A., T. & S. F. Ry. Co.*, p. 660), to avoid unnecessary costs, that the entire record in the last named case, including the bill of exceptions, be printed in full; that in this cause the entire record be printed, except the bill of exceptions; that said causes in said Court of Appeals might be heard and argued together; and that the court might determine both causes on said printed records the same as if the bill of exceptions had been printed in both records. All of which was done accordingly.

The petition averred and the proof at the trial showed, that the plaintiff cattle company was a corporation, created by the laws of South Dakota and a resident and citizen of said state, and that the defendant railway company was a corporation created by the laws of the State of Kansas, having its chief office at Topeka, in the First Division of the State of Kansas, in which this suit was brought.

The case was tried by the said circuit court, with a jury. The trial continued for a period of nine days, from January 16, 1905, to January 25, 1905, and the

trial was had on the petition of plaintiff, the answer of defendant, and the reply thereto, of the plaintiff.

The case of the plaintiff, both in the Circuit Court and in the Circuit Court of Appeals of the Eighth Circuit, was prosecuted by them upon the theory of the liability of the defendant to plaintiffs, on two grounds. First, that the death of and injury to plaintiffs' cattle resulted from the deviation by defendant of the shipment, without plaintiffs' consent, from the line on which the cattle were routed to go; and, second, that the death of and loss to plaintiffs' cattle resulted also from the different negligences of the defendant specified in the petition of plaintiffs.

At the conclusion of the trial, plaintiff asked the court to give, and presented to the court, fourteen different instructions to the jury. Those instructions may be found from pages 637 to 644 of the Record.

The first instruction (p. 637) was a peremptory instruction which the plaintiff prayed the court to give, instructing the jury peremptorily to return a verdict in the case for the plaintiff. This instruction was founded upon the proposition maintained by plaintiff that defendant was absolutely liable to plaintiff on the facts of the case, as a matter of law, for the death and loss of plaintiff's cattle, by reason of the deviation of the shipment from the routed line without plaintiff's consent; and the prayer in this peremptory instruction proceeded upon the theory that that branch of the case, on the undeniable and conceded facts of the case, presented a question of law for decision by the court.

The other thirteen instructions presented at the same time with said peremptory instruction and to be found from page 638 to 644 of the Record, were instructions asking the court, in the event that the peremptory instruction should be denied, to submit to the jury the is-

sues of negligence in the case. All of the thirteen instructions referred to, asked the court to submit the issues of negligence to the jury. It was, of course, understood by the court, as well as by counsel, that, if the peremptory instruction based on the unlawful and wrongful deviation, was given, it would not be necessary to consider those other instructions.

At the same time plaintiff presented those several instructions, defendant asked a peremptory instruction to the jury. The court gave the defendant's peremptory instruction to the jury, to return a verdict for the defendant, and denied each and all of plaintiff's said instructions. To those several rulings, plaintiff excepted at the time.

The jury, under the instructions of the court, gave a verdict for the defendant (p. 644, Record) and a final judgment was given for the defendant (pp. 30-31, Record, cause 2277).

Afterwards plaintiff filed a Bill of Exceptions in the case, which extends from p. 29 to p. 656 of the printed Record.

The pleadings in the case may be found from p. 5 to p. 25 of the Record proper of this cause (No. 2277).

A history of the trial of the case will be found from p. 21 to p. 28 of the Record in the other case (No. 2276) and from p. 25 to p. 31 of the Record in this case (No. 2277).

The final judgment in the case, in the Circuit Court, was given January 25, 1905.

Within due time the cause was duly removed by a writ of error, citation and by filing an assignment of errors, to the United States Circuit Court of Appeals of the Eighth Circuit.

The case was heard in the Circuit Court of Appeals in December, 1905, and was decided by that court July

9, 1906, by an affirmance of the verdict and judgment of the Circuit Court. (*Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep., 457; *Minnesota and Dakota Cottle Co.* v. *Same, id.*, 463.)

Afterwards, on August 9, 1906, said Circuit Court of Appeals made an order extending the time to November 1, 1906, within which plaintiffs could file their petition for a rehearing in said cause.

Afterwards, on September 20, 1906, plaintiff filed its petition for a rehearing in said cause, after serving the same on counsel of defendant, and said petition for a rehearing having been served and filed, in accordance with the rules of said United States Circuit Court of Appeals, was considered by that court and denied, November 17, 1906; and, by the denial of said petition for a rehearing, said judgment of affirmance of said Court of Appeals of the said judgment of the said Circuit Court in said cause became final.

Said petitioner further shows to the court, as will appear from the opinion of said Circuit Court of Appeals, (147 Fed., 457), that said judgment of affirmance by said Court of Appeals was based upon the ground adjudged in its opinion by said Circuit Court of Appeals, that, because plaintiffs, at the conclusion of the trial of said cause in said Circuit Court, presented to and requested said Circuit Court to give a peremptory instruction to the jury to return a verdict for plaintiff, plaintiff was precluded from the right to have considered said other thirteen instructions, although presented at the same time of and with said peremptory instruction in the event that said Circuit Court should deny said peremptory instruction asked by plaintiff.

Petitioner says it is advised that said ruling of the Circuit Court of Appeals in its opinion affirming the judgment in this cause, is the first and only time that

it has been adjudged by any American court, state or federal, that a party to a suit, who asks the giving of a peremptory instruction to a jury and at the same time asks the giving of other instructions to the jury submitting the issues to the jury in the event that the peremptory instruction thus asked shall be denied, is precluded, by the asking of such peremptory instruction under those circumstances, from having the other instructions considered, if the peremptory instruction is denied. Petitioner says it is advised that it is the general practice as understood by the members of the American bar, generally that where, as in this case, instructions are asked, one of which is a peremptory instruction to the jury and the others submitting the issues to the jury, for the court, in the event of the denial of the peremptory instruction, to consider the other instructions for the submission of the issues to the jury; and petitioners in that view, submit that the decision in this cause by said Circuit Court of Appeals is contrary to the general practice which prevails in the federal and state courts in like cases.

Petitioner shows to the court, as appears from the opinion of said Circuit Court of Appeals, that said opinion is contrary to a decision of this court and to the decisions in like cases of other Circuit Courts of Appeal and is also contrary to the decisions of the Court of Appeals of the State of New York, cited in said opinion in this case.

Said petitioner, in order to enable this court to see how the issues of deviation and negligence in this case arose, submits in this, its petition for a writ of *certiorari,* the following statement of facts:

On May 25, 1903, petitioner was the owner of the 2,293 head of cattle in controversy, consisting of two trainloads at Kenna, New Mexico, and one trainload at Bovina, Texas, which they shipped from said

points for transportation, by rail, from said point to Evarts, South Dakota; that said shipment was made from said points over three lines of railway, to-wit, from said points to Amarillo, Texas, over the Pecos & North Texas Railway; from Amarillo to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company at said Atchison, Kansas.

Said 2,293 head of cattle, in the cars in which they were shipped, were delivered to defendant at said Amarillo, Texas, for shipment over defendant's railway north to Atchison, Kansas, to be there delivered by it to said connecting railway company, and said defendant, on May 25 and 26, 1903, accepted from plaintiff said 2,293 head of cattle for shipment from said Amarillo, Texas, to said Atchison, Kansas.

Said 2,293 head of cattle were transported by defendant, as such common carrier, from Amarillo, Texas, to Wellington, Kansas, which is a station on said defendant's line of railway between said Amarillo, Texas, and Atchison, Kansas.

In said State of Kansas where said defendant's railway crosses said state, in passing from Amarillo, Texas, to Atchison, Kansas, there are three cities situate on said railway, viz: Wellington, Kansas, Emporia, Kansas, and Topeka, Kansas. The general course of defendant's railway across said State of Kansas, in passing from Amarillo, Texas, to Atchison, Kansas, is from southwest to northeast. Wellington, Kansas, is southwest, or southwesterly, from Topeka, and Emporia, Kansas, is between Wellington, Kansas, and Topeka, Kansas.

Said cattle of petitioner were unloaded by defendant into defendant's pens, at said Wellington and Strong

City, Kansas, on May 26, 1903, for the purpose of being fed and watered and of obtaining rest, as provided by the law of Congress in such cases. Petitioner's cattle were so unloaded on the night of May 26, 1903, and were ready to be reloaded and for the transportation to be continued and the transit resumed on the next morning of May 27, 1903.

During the entire month of May, 1903, there were continuous rains night and day, in the valley of the Kaw river, which flows from Eastern Colorado to Eastern Kansas, east, across the State of Kansas, and which empties into the Missouri river, at Kansas City, Missouri. The watershed of the Kaw river extends from the southern portion of Nebraska across the northern part of Kansas, to a point about ten miles south of said Kaw river.

Said rains created in the valley of said Kaw river an unprecedented flood, which commenced to rise about May 15, 1903.

Notwithstanding said 2,293 head of cattle had been fed and watered and had time to rest so that they were ready to be reloaded and were ready for the transportation and carriage thereof to be resumed and continued on the morning of May 27, 1903, defendant railway company, by reason of the rise of said flood, detained said cattle on its, the defendant's own motion, at said Wellington and Strong City, in the pens of defendant, from the said morning of May 27, 1903, until noon, May 29, 1903. Said May 27, 1903, was on Wednesday, and said flood, as we will see further on, reached its climax Saturday night, May 30, 1903. After so detaining said cattle, and after loading, unloading and reloading said cattle two or three times by defendant railway company, defendant continued the transportation and transit of said cattle Friday, May 29th, 1903, and said cattle were by defendant then hauled to Emporia, Kansas, which last city is southwest

of Topeka, Kansas, and is on the uplands some considerable distance from the valley of the Kaw river at Topeka.

As already stated, said 2,293 head of cattle were routed to go over defendant's railway northeasterly, passing through said Wellington, Kansas, and Strong City, Kansas, Emporia, Kansas, and across the Kaw river at Topeka, and thence northeasterly to Atchison, Kansas, which is situate on the Missouri river. (Opinion of trial court, Record, p. 645, 135 Fed. Rep., 135.)

On the arrival of the cattle at Emporia during the afternoon of Friday, May 29, 1903, it was and had been for six hours and more known by the defendant's officers and servants, that the line on which these cattle were routed to go to Atchison, crossing over the Kaw river at Topeka, was flooded and had been flooded from two o'clock that morning, so as to be impassable; that defendant's line from Topeka to Kansas City had been likewise flooded so as to be impassable and the transit and transportation of said cattle at said Emporia was by defendant, its officers, agents and servants, without plaintiff's consent, deviated from their route and transit over defendant's line northeast to Topeka and Atchison, to another line of defendant, known as the "Ottawa cut-off" and which cut-off extended from Emporia to Kansas City, by way of Ottawa, Olathe and Holliday, and from Holliday over its line from Topeka to Kansas City, Missouri.

In this connection, it should be stated that the defendant had and has no railway running from Kansas City to Atchison, Kansas. The only railway owned or operated by defendant, either in 1903 or since, north or east from Kansas City, is its line from Kansas City to Chicago.

The transit and transportation of said cattle which

were thus deviated at Emporia, Kansas, were so deviated for the purpose of transporting the same over said cut-off of defendant, to Kansas City, Missouri, which was sixty miles and more east of Topeka, Kansas, and distant that far from the line of defendant's railway on which, by the shipping contract of the parties, said cattle were routed to go in their passage to South Dakota.

After the deviation of said cattle at said Emporia, Kansas, over said other line, defendant ascertained that it could not get to Kansas City over its own line; and, on the arrival of the train containing the cars which carried petitioners' cattle, at Olathe, Kansas, during the night of Friday, May 29, 1903, defendant, finding that it could not get to Kansas City over its own line in consequence of the fact that all of its lines west of Kansas City, including said cut-off, were flooded, transported said train of cars containing petitioners' said cattle in a roundabout way to said Kansas City from said Olathe, over the tracks of the St. Louis & San Francisco Railway Company. In this way defendant succeeded in transporting said train of cars conveying petitioners' said cattle from the uplands over which said cattle had been transported up to that time, to the valley and mouth of the Kaw river at Kansas City, where said defendant, without obtaining petitioners' consent, unloaded said cattle in the shipping pens at the Kansas City Stock Yards, alongside of and at the mouth of said Kaw river. One trainload of said cattle were unloaded in said stock yards on the evening of Friday, May 29th, and the other two trains on the morning of Saturday, May 30, 1903. On Sunday, May 31, 1903, the said flood which had so continued during a large part of said month of May, 1903, in the valley of said Kaw river, rose to such heights as to flood said stock yards, and said cattle, having been left without any further attention by defendant railway company after the

deposit by it of said cattle in said stock yards, were, by the agents and employees of said stock yards company, driven out of the pens in said stock yards, on said Sunday, up into the overhanging viaducts and chutes which passed through and over said stock yards. This was done by the officers and employees of the Stock Yards Company, for the purpose of preventing said cattle from being drowned in said stock yards. Said cattle remained in said overhanging chutes and said viaducts several days, during which time, in consequence of the impossibility of feeding and watering said cattle, a large number of them died and the balance were very seriously damaged.

The petition of the plaintiff in the case, after fully stating the foregoing facts, and other facts, summed up therein the grounds of liability claimed against the defendant, as follows:

First. Defendant did not exercise due and reasonable care, but was negligent in its detention of said cattle at Wellington, Kansas, and at Strong City, Kansas, and by the exercise of due and proper diligence could have carried and transported said cattle to Atchison, Kansas, by way of Topeka, Kansas, and delivered the same to the connecting carrier at that point, and thus escaped the peril and destruction of the flood.

Second. That defendant was guilty of negligence, after having so long detained said cattle at Strong City and at Wellington, Kansas, in not further detaining or holding them in some place of safety until the unprecedented flood in the Kaw river, hereinbefore mentioned, had subsided, so that the transportation of said cattle might be safely resumed.

Third. That defendant was guilty of a wrongful and negligent act in diverging and deviating the shipments of said cattle to Kansas City, Missouri, off of the line of transportation over which said cattle were directed by the plaintiff to be carried.

Fourth. That the defendant negligently and carelessly and knowing that an unprecedented flood was de-

scending the Kansas river, hauled said cattle into the low lands at the mouth of said river and unloaded and left them in front of the approaching flood.

Fifth. That defendant, after having wrongfully transported said cattle to Kansas City, Missouri, as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved, the same from their position of peril in the stock yards at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, but the same were overtaken by the flood.

Sixth. That the defendant did not exercise due and reasonable care and diligence and was negligent in not properly or sufficiently feeding and watering said cattle, both while the same were at Strong City, Kansas, and at Wellington, Kansas, and while the same were in the yards and viaducts of the Kansas City Stock Yards Company at Kansas City, Missouri.

At the trial of the case in the Circuit Court, Mr. Connor, who has charge of the United States Weather Bureau office at Kansas City, Missouri, testified that the rainfall which produced the Kaw river flood of May, 1903, commenced in April, 1903; that there was a slight cessation of the rain early in May and another cessation from about the 15th to the 18th of May, 1903, and with that exception the rains were continuous through May, night and day. (p. 300, Record.)

The defendant, during 1903 and ever since, has had its chief offices at Topeka, Kansas, which is about sixty miles west of Kansas City, and Mr. Connor testified that a flood in the Kaw river at Topeka would, in the regular course of the flow of water, reach Kansas City in about thirty hours.

Mr. T. B. Jennings, who had charge of the United States Weather Bureau at Topeka, Kansas, testified that the rainfall the first twenty days of May, 1903, averaged about four inches, in the western part of the Kaw water shed; that from the 21st to the 28th of May, 1903, the

rainfall in that region averaged another four inches, and that on May 28, 1903, came the tremendous rainfall in that region, which was about five and one-fourth inches, at Salina, Kansas. He said, "We got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next 7 days that was re-May rainfall, then during the next seven days that was repeated, and on the 28th we had the tremendous downpour in the central counties, extending from Saline county northeastward into Marshall." (p. 129, Record.)

Another witness in the case (p. 223, Record) was W. E. King, Assistant City Engineer of Topeka, Kansas, who testified that he took observations of the rise of the Kaw river at Topeka, and that on the morning of May 28, 1903, at 8:30 o'clock, the Kaw river was then 16.88 feet, or eleven inches, above low water mark; that the Kaw river continued to rise after that; that he kept men stationed at that point until the crest of the flood; that he had a thirty minutes continuous report from May 28, at 8:30, to June 6, at 10:30; that the crest of the flood was reached at 9 p. m. on May 30, and that between 8:30 the morning of the 28th, and 9 p. m. of May 30, the water rose ten and one-tenth feet.

The testimony of Theron S. Cafferty (p. 225, Record), and of C. T. McLellan (p. 292, Record), who were division officers of defendant company, shows that defendant's roads in Kansas, from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City, were all flooded from an early hour on the morning of Friday, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded, as already stated, from an early hour on the morning of Friday, May 29, 1903, and that those facts were well known, not only by those division officers of

defendant company, but by Superintendent Hurley and all the general officers of the defendant company; that so extraordinary and perilous were the flood conditions on all of defendant's lines in the State of Kansas on said Friday morning, May 29, 1903, that attention was given to those conditions by Superintendent Hurley and the other general officers of the defendant, and that the movements of the train in question carrying petitioners' said cattle, were directed personally by Superintendent Hurley and the other general officers of the company, and the facts show that for six hours before said Friday noon, May 29, 1903, when said transit was resumed from said Strong City, said lines were and had been so flooded as to make it impossible for the defendant to reach the valley of the Kaw river or to cross the same, or to reach said Kansas City, at the mouth of said Kaw river, over any of the said lines of defendant. The evidence at the trial, which fully sustains all the averments of the petition and shows the foregoing facts, proves that the defendant company in starting said shipment from Strong City and in deviating the same from said Emporia, knowingly and wilfully went into the mouth of the flood, at its climax.

Defendant was negligent respecting the second of the above specifications, in leaving said Strong City on said Friday noon. As already stated, all of defendant's lines in Kansas were flooded early that Friday morning, and the testimony of Assistant Engineer King, of Topeka, shows that on Friday there was a tidal wave of water passing down the Kaw, which had accumulated from the rains described by said Jennings and had reached at that time the City of Topeka and which, according to the testimony of Weather Bureau Superintendent Connor, was certain to reach Kansas City within thirty hours after its passage by Topeka on said Fri-

day. It was therefore reckless, if not madness, for defendant, having detained petitioner's cattle at said Strong City and Wellington over two days, to attempt to reach or get across the Kaw River after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river.

The third specification, that defendant was negligent in endeavoring to get across the Kaw river by taking the cattle over its cut-off from Emporia, was sustained by the evidence.

The fourth specification of negligence was also sustained by the evidence.

The fifth specification of negligence, that defendant carelessly and negligently failed and neglected to move, or cause to be moved, said cattle from their position of peril in said stock yards, was sustained by the evidence.

One of the witnesses in the case was William M. Kendrick (Record, p. 283), who was the live stock agent at Kansas City of the C., B. & Q. R. R. Co., and who testified that his company could have taken petitioner's cattle out of Kansas City, north across the Kaw River, on the afternoon of Saturday, May 30, 1903; that he offered to defendant to take and transport the cattle in controversy, but that the defendant company refused and neglected to deliver the cattle to the said "Burlington" Company for that purpose; that as evidence of the fact that said Burlington Company could have taken petitioners' cattle out of and across said Kaw River, northerly, out of Kansas City on said Saturday afternoon. Mr. Kendrick testified that on said Saturday evening, May 30, 1903, 35 cars of cattle were shipped out of Kansas City north across said Kaw River by said Burlington Railroad Company (Record, pp. 227-228).

Another witness in the case was W. C. Sparks (Record, p. 345), who testified that he was a member of the

firm of Sparks Brothers, who were engaged in the mule business at Kansas City and had a mule yard a block south of the Kansas City Stock Yards, where petitioners' cattle were penned, and that on Sunday morning, May 31, 1903, Mr. Sparks' company drove out of their said mule yards, between six hundred and seven hundred head of mules, up out of the Kaw valley south, up to and on the uplands immediately south of Kansas City, and that in this way their mules were saved from the flood; and the testimony of Mr. Sparks shows that the same could have been done on that Sunday morning by defendant company, with respect to petitioners' said cattle in said stock yards, and that that was the wise and prudent course to have taken concerning petitioner's cattle instead of driving them up into said overhanging viaducts and chutes where petitioner's cattle were certain to and did suffer and die from starvation and want of water.

Another witness in the case was L. A. Allen (Record, p. 226), who testified that there were plenty of men and instrumentalities in and around the stock yards in Kansas City on that Sunday morning, by whom the cattle of petitioners could have been driven out of said stock yards.

The testimony in the case shows that said cattle of petitioner in the stock yards and the cattle of the plaintiff, Empire State Cattle Company, in the other companion case, presented also to this court for the writ of *certiorari,* constituted about all the cattle that were in the stock yards at said Kansas City on said Sunday, May 31, 1903.

Another witness in the case was one G. A. Roberts (Record, pp. 522-523), who was the live stock agent of the defendant company at Kansas City, whose testimony shows that defendant and its agents and officers gave no attention to the cattle of the petitioners

after they were thus deposited Saturday morning, May 30, 1903, in said stock yards, by the defendant railway company.

Another witness in the case was one A. W. Coombs (Record, p. 580), who was the Assistant General Live Stock Agent of defendant company at Kansas City, and who testified also that the officers of defendant company gave no attention to these cattle after they were deposited Saturday morning in said stock yards.

Another witness in the case was one Sharp, who was the superintendent of defendant's terminals at Kansas City, and whose testimony shows that he and General Superintendent Hurley were engaged Saturday and Saturday afternoon in moving from the defendant's yards at Argentine a large number of cars and engines out of danger from the rising flood, but that neither of those officers, nor any of the other officers of defendant, paid any attention to petitioner's cattle which had been by defendant thus deposited in said stock yards.

Petitioner submits that the opinion of the Circuit Court of Appeals in this case is opposed to the decisions of the New York Court of Appeals, cited in said opinion of said U. S. Court of Appeals. Thus, in *Kurtz* v. *Peck*, 113 N. Y., 222, it was adjudged that:

"Where, upon a jury trial, each party asks that a verdict be directed in his favor and neither asks to go to the jury on the questions of fact, the court is authorized to find upon the facts."

The above language clearly indicates that the court, in that case, held that if a party asks for a peremptory instruction and at the same time asks, in the event of the denial of that instruction, to go to the jury upon questions of fact, the party is not precluded by his peremptory instruction.

The same ruling was made by the same court, in *Sutter* v. *Vanderveer,* 122 N. Y., 652.

In the case of *Koehler* v. *Adler,* 78 N. Y., 287, the New York Court of Appeals, in an opinion delivered by Chief Justice Church and concurred in by the full bench of that court, used the following language:

"The action was for money loaned, and the verdict was directed by the court. The defendant alleges error in not submitting the case to the jury. At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, and the defendant then requested a like direction in his favor. The court stated that he thought the plaintiff entitled to the direction. The counsel for defendant then asked to go to the jury upon the question whether the debt in suit was ever contracted at all. This was denied, and an exception taken. Upon these facts we think that the defendant was entitled to go to the jury if the case warranted it. If nothing further had been done after both parties asked a direction of a verdict, it would be assumed that they intended to waive the right of submission to the jury, and consented that the court should decide the questions of law and fact involved. But after a request, and a refusal to direct a verdict, there is no absolute inconsistency in asking to submit questions of fact to the jury. It is not proper, ordinarily, to direct a verdict if there is any material question of fact which ought to be submitted, and it is error to make the direction in such a case. Parties may consent, however, that the court may pass upon all questions both of fact and law, and if they do they will be bound, and when both parties ask a direction this court will presume such consent. In this case the presumption is repelled by an express request to go to the jury upon a question of fact."

Said opinions of the New York Court of Appeals are in harmony with the understanding of the profession and the practice which everywhere prevails, both in the state and federal courts, by which practice a party may submit a series of instructions to the court, one of which

is peremptory in its character and the others of which are asked by the party submitting the instructions, in the event that the peremptory instruction is denied.

Petitioners are advised that great surprise will be experienced on the part of the bar, if this rule contended for by them in this case is permitted to be overturned by an affirmance of the decision of the Court of Appeals in this case. The opinion of the Court of Appeals in this case is also opposed to the express decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Sigua Iron Co.* v. *Greene,* 88 Fed., 207; 31 C. C. A., 477. The decision of the Circuit Court of Appeals in that case, as will be seen from the opening paragraphs of Circuit Judge Lacombe's opinion, is squarely in favor of the proposition we contend for and is decisive against the decision of the Court of Appeals in this case. Between the Circuit Court of Appeals in the Second Circuit, in that case, and the Circuit Court of Appeals in this case, there is a direct and irreconcilable conflict.

In the case of *Merwin* v. *Magone,* 70 Fed., 776; 17 C. C. A., 361, the court in its opinion by Judge Shipman, said:

"It will be observed that neither party raised a question of fact, and each asked for a direction in his favor. In such a case, the finding is conclusive if there is any evidence to sustain it."

To the same effect is *Magone* v. *Origet,* 70 Fed., 778; 17 C. C. A., 363.

So, in the decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Chrystie* v. *Foster,* 61 Fed., 551; 9 C. C. A., 606, that court, in its opinion by Judge Wallace, said:

"Where the defendant excepts to the direction of a verdict for the plaintiff, but makes no request to go to the jury, he cannot be heard to assail the judgment upon

the ground that there were questions of fact for the jury. *Provost* v. *McEncroe,* 102 N. Y., 650, 5 N. E., 795. Where both parties move for the direction of a verdict, and neither requests any question of fact to be submitted to the jury, they concede that there is no question of fact, and that the case turns wholly upon the questions of law, which are to be determined as though the facts were undisputed."

The opinion of the court is also opposed to the opinion and decision of the Circuit Court of Appeals of the Sixth Circuit, in the case of *Monahan* v. *Grand Trunk Western Ry. Co.,* 138 Fed., 37.

In the opinion in that case, which was delivered by Circuit Judge Severens, the court said:

"The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the jury be directed to return a verdict for that party. This request having been discussed by the counsel for the respective parties, the court was proceeding to give its opinion and instructions to the jury, and seemed to indicate, as plaintiff's counsel thought, a purpose to sustain the defendant's request for a positive direction in its favor. Thereupon the court permitted an interruption to allow the plaintiff's counsel to put on file certain requests to instruct the jury, and assured the counsel that he should have the benefit of them, and then, after giving its views at length, directed a verdict for defendant. The requests filed by plaintiff were eighteen in number, the first being as follows:

'(1) Under the pleadings and proofs, you are instructed that your verdict must be for the plaintiff, and the only question for you is as to the amount of damages.'

"The others related to particular matters of law and fact involved in the issue. The court did not comply with any of these requests. The plaintiff excepted to the ruling of the court upon defendant's motion for directing the verdict in its favor, and to the refusal of the

court to give the instructions requested in his behalf. Counsel for defendant now urge that the request of each of the parties for a peremptory instruction by the court had the effect of a joint withdrawal of the issues of fact from the jury and a submission of them to the court for its determination, and that, the court having decided them in favor of the defendant, both parties are concluded by the finding, citing *Beuttell* v. *Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654. In that case there was no disputed question of fact, and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttell* v. *Magone* has been cited in the appellate courts the conditions were the same; there was no disputed question of fact, and there were no special requests. *Merwin* v. *Magone*, 70 Fed., 776, 17 C. C. A., 361; *Magone* v. *Origet*, 70 Fed., 778, 17 C. C. A., 363; *Bradley Timber Co.* v. *White*, 121 Fed., 779, 58 C. C. A., 55; *United States* v. *Bishop*, 125 Fed., 181, 60 C. C. A., 123; *Phoenix Ins. Co.* v. *Kerr*, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569.

"In *Beuttell* v. *Magone* it is expressly stated that such request made by the respective parties is not the equivalent of a submission of the case to the court without the intervention of a jury, within the intendment of Rev. St., sections 649, 700 (U. S. Comp. St. 1901, pp. 525, 570). The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request

for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor, without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court *pro hac vice* upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the party wishes to obtain the opinion of the court upon the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the opinion of the court should be that a question for the jury is presented, then to ask that appropriate instructions be given them to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in *Beuttell* v. *Magone* to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests."

So far as we have been able to observe, it is true of all of the cases, state and federal, in which this question of waiver where both parties have joined in asking a peremptory instruction alone, arose that each case presented a single issue on the part of the plaintiff, and that an issue of fact triable by the jury; and, as we have seen, save and except the decision of the Court of Appeals in this case, in each of that class of cases involving a single issue alone, the rulings have been that where either party at the time of presenting a request for a peremptory instruction also presented a series of instructions to be given to the jury in the event of the denial of the peremptory instruction, the party thereby did not waive the right to go to the jury on the issues of fact.

But in the case at bar, there were and are two issues tendered by the plaintiffs. In the case at bar, from the beginning of the case as made by the petition, the plaintiff claimed a liability on the part of the defendant railway carrier upon two grounds, one on the ground of deviation, without plaintiff's consent, of the shipment from its line running to Topeka and Atchison, to Kansas City, from which point it had no line to Atchison, the other the grounds of negligence aforesaid.

We contended in the Court of Appeals, that the authorities are practically unbroken to the effect that where a shipment is deviated by the carrier, as in the case at bar, without the consent of the shipper, the carrier assumes by such deviation absolute responsibility, and the act of God is no defense in that class of cases.

In our brief in the Court of Appeals in this case, in support of the proposition of absolute liability of the defendant carrier, on the ground of deviation, we cited the following authorities:

Crosby v. *Fitch,* 12 Conn., 410, l. c. 419, 420, 423;
R. R. Co. v. *Beck,* 125 Pa. St., 620;
Phillips v. *Bingham,* 26 Ga., 617;
R. R. Co. v. *Cole,* 68 Ga., 623;
Cassilay v. *Young,* 4 B. Mon., 265;
Sager v. *R. R. Co.,* 31 Me., 228, l. c. 238;
R. R. Co. v. *Washburn,* 22 O. St., 324;
Ex. Co. v. *Smith,* 33 O. St., 511;
Brown Co. v. *R. R. Co.,* 63 Minn., 546;
Hedricks v. *Steamship Co.,* 18 La. Ann., 353;
Hastings v. *Pepper,* 11 Pick., 41;
Proctor v. *R. R. Co.,* 105 Mass., 512;
Ry. Co. v. *Allison,* 59 Tex., 193;
Johnson v. *Ry. Co.,* 33 N. Y., 610, l. c. 611;
Goodrich v. *Thompson,* 44 N. Y., 324;
Maghee v. *R. R. Co.,* 45 N. Y., 514;
Keeney v. *Ry. Co.,* 47 N. Y., 525;
Robertson v. *Nat. S. S. Co.,* 14 N. Y. Sup., 313;
Seavey Co. v. *Union Trans. Co.,* 106 Wis., 394;
Ry. Co. v. *Brichetto,* 72 Miss., 891;
R. R. Co. v. *Odil,* 96 Tenn., 61;
Mer. Dis. Tr. Co. v. *Kahn,* 76 Ill., 520;
Vol. 1. Am. & Eng. Enc. Law (2nd Ed.), 594;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 422, 426;
Hutchinson on Carriers, Secs. 190, 191;
Lawson on Bailments, Sec. 127;
Vol. 6 Cyc. of Law & Procedure, 383, 384;
Marsh v. *Un. Pac. R. R. Co.,* 9 Fed. Rep., 873;
Ins. Co. v. *LeRoy,* 7 Cranch., 26;
Hostetter v. *Park,* 137 U. S., 30, l. c. 40;
Constable v. *Steamship Co.,* 154 U. S., 51, l. c. 66.

In the Court of Appeals, in our brief in this case, we contended in support of the proposition that in cases like this where the act of God is claimed to be the cause of the result, the carrier is still liable if it is guilty of contributory negligence, operating in connection with the act of God to cause the injury, and in support of that proposition in our brief in the Court of Appeals, we cited the following authorities:

Sweezy v. *Philadelphia,* 64 Pa. St., 106;
Helbling v. *Cemetery Co.,* 201 Pa. St., 171;
Morrison v. *Davis,* 20 Pa. St., l. c. 176, 177;
Williams v. *Grant,* 1 Conn., 487;
Wallace v. *Clayton,* 42 Ga., 443;
R. R. Co. v. *White,* 88 Ga., 805;
Merritt v. *Earle,* 29 N. Y., 115, l. c. 116f;
Michaels v. *R. R. Co.,* 30 N. Y., 564, l. c. 570;
Bibb Broom Corn Co. v. *A. T. & S. F. Ry. Co.,* 102 N. W. Rep. (Minn. Sup. Ct..), p. 709;
R. R. Co. v. *Curtiss,* 80 Ill., 324;
Wald v. *R. R. Co.,* 162 Ill., 545;
Blodgett v. *Abbott,* 72 Wis., 516;
Nelson v. *Ry. Co.,* 72 Pac. Rep. (Mon. Sup. Ct.), 643, l. c. 651;
Steamboat Co. v. *Tiers,* 24 N. J. Law Rep., 697;
R. R. Co. v. *David,* 6 Heisk, 261;
McGraw v. *R. R. Co.,* 18 W. Va., 361;
Smith v. *Ry. Co.,* 91 Ala, 455, l. c. 456;
Coosa Steamboat Co. v. *Barclay,* 30 Ala., 12, l. c. 127;
Nugent v. *Smith,* 1 C. P. Div., 19 and 423;
Vol. 1 Am. & Eng. Enc. Law (2nd Ed.), 595;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 234;
Hutchinson on Carriers, Secs. 181, 187, 188;
Vol. 6 Cyc. Law & Proced., 377, 384;

Strauss v. *Ry. Co.*, 17 Fed. Rep., 209, l. c. 212;
Caldwell v. *Sou. Ex. Co.*, 4 Fed. Cas. No. 2303, p. 1036.
Thompkins v. *Duches of Ulster*, 24 Fed. Cas. No. 14087a, p. 32;
Southern Pac. Co. v. *Schoer*, 52 C. C. A., 269, l. c. 274;
Newport News Co. v. *U. S.*, 9 C. C. A., 579;
Clark v. *Barnwell*, 12 How., 272; l. c. 280;
Holladay v. *Kennard*, 12 Wall., 254;
Gleason v. *R. R. Co.*, 140 U. S., 433;
The Majestic, 166 U. S., 376, l. c. 386.

Petitioner further represents that its counsel in the Court of Appeals in this case, in their brief in support of the proposition that the question of what was the proximate cause of the loss in this case and whether it was the carrier's negligence or whether it was solely the act of God, as claimed by the carrier, were questions of fact for trial by the jury, and in support of that proposition the case of *Milwaukee & St. Paul* v. *Kellogg*, 94 U. S., 469, was cited. And in the brief of counsel of petitioners in the Court of Appeals, in support of the proposition that the questions of negligence in this case were questions of fact to be decided by the jury, the following cases were cited:

R. R. Co. v. *Stout*, 17 Wall., 657, l. c. 653;
Ry. Co. v. *McDonald*, 152 U. S., 662, l. c. 275;
Marande v. *R. R. Co.*, 184 U. S., 173.

It is thus seen that in this case two issues were involved, both in the Court of Appeals and in the trial court, which, as already stated, were the issues of the carrier's liability on the grounds of deviation and negligence. The liability of the carrier in this case on each of those grounds stands separate and wholly apart from its liability on the other ground. The carrier in this case

might be liable on the ground of deviation and not liable on the ground of negligence, or it might be liable on the grounds of negligence and not be liable on the ground of deviation. The carrier in this case might be liable on both grounds. The decision in this case of either question of liability, namely, deviation or negligence, is not in the nature of things a decision of the other question.

The question of liability on the ground of deviation was a law question, pure and simple. In this case the deviation was without plaintiffs' consent and without any consultation with plaintiffs. And the question of liability of the defendant carrier in this case on the ground of deviation, being a law question, pure and simple, there was no other way for the petitioners in the trial court to reach and obtain a proper determination of that question except to ask, as they did ask, a peremptory instruction to the jury based on that legal proposition of liability.

Since the questions of negligence were questions of fact, triable by the jury, there was no way under the law, since there was not a waiver of the jury trial in the case, for a decision of the questions of negligence except by the jury. Therefore petitioner in asking the court to give a peremptory instruction to the jury, on the basis of liability founded on deviation and at the same time asking the court to give certain instructions on the propositions of negligence, was simply asking the court to pass upon all of the law questions in the case.

As we have already seen, in the case of *Beuttell* v. *Magone*, 157 U. S. 154, and in the other Court of Appeals cases cited in the opinion of the court in this case, there was but a single issue, but if the rule adjudged by the Court of Appeals in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition of fact, how

much more would that result be true in the case at bar, where the liability is claimed on two grounds.

It is undoubtedly true, petitioners say, that while a decision of the case in favor of the plaintiffs on the ground of deviation would absolve the court from the necessity of a decision on the question of negligence, still judgment against the plaintiffs cannot be given in this case without a decision against them of both questions of deviation and negligence. Petitioners had the right to the trial of both issues by the aforesaid tribunals of judge and jury before a final judgment could be given against them. The trial court in this case assumed to decide and did decide both issues of deviation and negligence against the petitioners.

Our contention in the Court of Appeals was, that the decision of the trial court on the question of deviation was against the unbroken authorities applicable to the question of deviation in such cases, and that the trial court, in taking the case from the jury on the questions of negligence, usurped the province of the jury. However, the Court of Appeals practically refused to decide either question of deviation or negligence, because, as held by the Court of Appeals, petitioner had lost its right as litigant in the case by asking the trial court to decide all the law questions in the case arising on both issues. If the rule sanctioned by the Court of Appeals in this case becomes the rule applicable to all such cases, it would seem that the result would follow that because a litigant in the trial court asks the court to decide all the law questions in the case, the Court of Appeals on becoming possessed of the case will be prevented from saying anything more in an opinion in the case than if without any consideration of the case the word "affirmed" only were written therein.

In view of the conflict between the decision of this

Court of Appeals in this case and the other decisions referred to, state and federal, we submit that in harmony with the decision of this court in *Forsythe* v. *Hammond*, 166 U. S., 506, the writ of *certiorari* prayed for by this petition is the proper remedy to settle the conflict made by this decision. If the decision of the Court of Appeals in this case on this question of practice is correct and is important to every litigant and lawyer in this country, this court ought, we submit, to grant this writ of *certiorari* and on the hearing of this case overrule the decisions of the other Circuit Courts of Appeals with which the decision in this case is in conflict. If, on the other hand, this court is of opinion that the decisions referred to of the other Circuit Courts of Appeals and of the Court of Appeals of New York are correct, then we submit that this court on the hearing of this case should so decide, in order to settle the conflict. A duly certified copy of the entire record in this cause in said Court of Appeals, and the number of uncertified copies required by the rules of this court, accompany this petition and are filed herewith as a part of this petition.

Petitioner prays this court to grant the writ of *certiorari* herein to said Circuit Court of Appeals of the Eighth Circuit and on the hearing and decision of this case by this court that this court will reverse the decisions and judgments of the said Circuit Court and of the said Circuit Court of Appeals herein and remand this case to the Circuit Court for a new trial on both the issues of deviation and negligence.

R. E. Ball

James S. Botsford

Attorneys for Petitioners.

State of Missouri, County of Jackson, ss.

Robert E. Ball, being duly sworn, on his oath states, that he is one of the attorneys of petitioner in this case, and has been in both the Circuit Court and the Court of Appeals; that he has read the foregoing petition and that the matters set forth therein are true, as he verily believes.

Robt E Ball

Sworn to and subscribed before me this 18th day of December, 1906.

My commission expires Jan 27th 1910

Woodson Beason

Notary Public.